RECORD AND BRIEFS

15-1485

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants below, are the District of Columbia and two of its police officers, Andre Parker and Anthony Campanale.

Respondents, who were the appellees below, are Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Antoinette Colbert (as personal representative of the Estate of Ethelbert Louis), Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., and Stanley Richardson.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. Factual Background	3
B. District Court Proceedings	4
C. The Court of Appeals' Opinion	5
D. The Court of Appeals' Denial of Rehearing En Banc	9
REASONS FOR GRANTING THE PETITION	11
I. The District Of Columbia Circuit's Heightened Probable Cause Standard Conflicts With The Standard Employed By Other Courts, And This Court's Fourth Amendment Jurisprudence Generally, On An Important And Recurring Issue	11
A. The court of appeals' heightened probable cause standard deviates markedly from that employed by its sister circuits and state courts	11

TABLE OF CONTENTS—Continued

Page

B. The court of appeals' heightened probable cause standard is contrary to this Court's established Fourth Amendment jurisprudence 17

1. The court of appeals' standard is inconsistent with the "totality of the circumstances" test 17

2. The court of appeals imposed too high a bar for probable cause, contrary to this Court's express warnings 20

C. Whether the probable cause standard allows officers to make reasonable credibility judgments is an important question that officers routinely face 22

II. Even Assuming That Probable Cause Was Lacking, The Court Of Appeals' Decision Contravenes This Court's Precedent On Qualified Immunity Requiring That The Law Be Clearly Established In A Particularized Sense 24

CONCLUSION 29

APPENDIX

APPENDIX A: OPINION, U.S. Court of Appeals for the District of Columbia Circuit (September 2, 2014) 1a

TABLE OF CONTENTS—Continued

Page

APPENDIX B: MEMORANDUM OPINION AND ORDER, U.S. District Court for the District of Columbia (January 18, 2012) 45a

APPENDIX C: ORDER, ON PETITION FOR REHEARING EN BANC, U.S. Court of Appeals for the District of Columbia Circuit (February 8, 2016) 102a

TABLE OF AUTHORITIES

Cases	Page(s)
Adams v. Williams, 407 U.S. 143 (1972)	20, 21
Anderson v. Creighton, 483 U.S. 635 (1987)	25, 28
Artisst v. United States, 554 A.2d 327 (D.C. 1989)	11, 26
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)	28
Baker v. McCollan, 443 U.S. 137 (1979)	22
Bodzin v. City of Dallas, 768 F.2d 723 (5th Cir. 1985)	22-23
Borgman v. Kedley, 646 F.3d 518 (8th Cir. 2011)	23
City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015)	24
Criss v. Kent, 867 F.2d 259 (6th Cir. 1988)	14, 15, 26
Crockett v. Cumberland Coll., 316 F.3d 571 (6th Cir. 2003)	15
Cox v. Hainey, 391 F.3d 25 (1st Cir. 2004)	21
Finigan v. Marshall, 574 F.3d 57 (2d Cir. 2009)	12, 13, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Florida v. Harris,
133 S. Ct. 1050 (2013) 17, 19, 20

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 24

Hope v. Pelzer,
536 U.S. 730 (2002) 27, 28

Hunter v. Bryant,
502 U.S. 224 (1991) 25

Illinois v. Gates,
462 U.S. 213 (1983) 20, 21

Kaley v. United States,
134 S. Ct. 1090 (2014) 20

Kozlovska v. United States,
30 A.3d 799 (D.C. 2011) 26-27

Marks v. Carmody,
234 F.3d 1006 (7th Cir. 2000) 15, 26

Maryland v. Pringle,
540 U.S. 366 (2003) 19, 21

McGloin v. United States,
232 A.2d 90 (D.C. 1967) 11, 26

Mullenix v. Luna,
136 S. Ct. 305 (2015) 24, 25, 28

Nichols v. Woodward & Lothrop, Inc.,
322 A.2d 283 (D.C. 1974) 16, 27

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Prieto v. May Dep't Stores Co.,
216 A.2d 577 (D.C. 1966) 16, 27

Ramirez v. City of Buena Park,
560 F.3d 1012 (9th Cir. 2009) 15

Reichle v. Howards,
132 S. Ct. 2088 (2012) 24

Royster v. Nichols,
698 F.3d 681 (8th Cir. 2012) 15, 26

Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) 27

Saucier v. Katz,
533 U.S. 194 (2001) 25

Sennett v. United States,
667 F.3d 531 (4th Cir. 2012) 15

Stanton v. Sims,
134 S. Ct. 3 (2013) 24

State v. Newcomb,
20 A.3d 881 (N.H. 2011) 13, 14, 26

Taylor v. Barkes,
135 S. Ct. 2042 (2015) 24

Tillman v. Wash. Metro. Area Transp. Auth., 695 A.2d 94 (D.C. 1997) 16, 27

United States v. Arvizu,
534 U.S. 266 (2002) 18

Wesby v. District of Columbia,
765 F.3d 13 (D.C. Cir. 2014) 1

TABLE OF AUTHORITIES—Continued

Page(s)

Wesby v. District of Columbia,
816 F.3d 96 (D.C. Cir. 2016) 1

Wesby v. District of Columbia,
841 F. Supp. 2d 20 (D.D.C. 2012) 1

Wood v. Moss,
134 S. Ct. 2056 (2014) 24

Wright v. City of Philadelphia,
409 F.3d 595 (3d Cir. 2005) 13, 26

Zimmerman v. Doran,
807 F.3d 178 (7th Cir. 2015) 22

Constitution

U.S. Const. amend. IV ..... *passim*

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

42 U.S.C. § 1983 ..... 1-2, 4, 16

42 U.S.C. § 1988 5

Act of Mar. 3, 1901, ch. 854, § 824, 31 Stat. 1189, 1324 2

D.C. Code § 22-3302 (2008) 2, 20

Other Authorities

75 Am. Jur. 2d *Trespass* (2016) 22

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-44a) is reported at 765 F.3d 13. The order denying rehearing en banc with concurring and dissenting statements (App. 102a-139a) is reported at 816 F.3d 96. The memorandum opinion of the district court granting the respondents' motion for summary judgment (App. 45a-99a) is reported at 841 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The court of appeals denied a timely petition for rehearing en banc on February 8, 2016. On April 13, 2016, the Chief Justice extended the time for filing this petition for certiorari to and including June 8, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The respondents brought this action under 42 U.S.C. § 1983 alleging that their arrests for trespassing were without probable cause. The Fourth Amendment provides, in relevant part:

> The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ....

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

The District of Columbia's criminal trespass statute provided at the relevant time:

> Any person who, without lawful authority, shall enter, or attempt to enter, any ... private dwelling, building or other property, ... against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor ....

D.C. Code § 22-3302 (2008). This language remained essentially unchanged from the trespass statute that Congress enacted for the District in 1901. *See* Act of Mar. 3, 1901, ch. 854, § 824, 31 Stat. 1189, 1324.

STATEMENT OF THE CASE

This case raises the important and recurring question of when the Fourth Amendment probable cause standard allows police officers to assess a suspect's credibility when he claims an innocent mental state. It also calls for the Court again to correct lower courts when they impose liability on individual law enforcement officers in a manner contrary to this Court's qualified-immunity precedent.

A. Factual Background.

On March 16, 2008, about 1:00 a.m., the District of Columbia Metropolitan Police Department received a complaint from a neighbor about a loud party and possible illegal activities in a house located in an otherwise quiet residential neighborhood. (App. 118a-119a.) The neighbor told police that the property had been "vacant for several months." (App. 119a.)

Officers soon arrived at the home and heard music coming from inside. (App. 119a.) When the uniformed officers knocked and entered, the people inside scattered into other rooms. (App. 119a.) After searching throughout the house, police found 21 persons inside, including a man hiding in a closet. (App. 59a, 119a.) The officers observed activity like that "conducted in strip clubs for profit." (App. 119a.) Several women were "dressed only in their bra and thong with money hanging out [of] their garter belts." (App. 58a.) Officers also smelled marijuana in the home. (App. 53a, 55a.) Consistent with "being a vacant property," the house was in "disarray" and essentially unfurnished. (App. 119a.)

A supervisor, Sergeant Andre Suber, and several other officers, including petitioners Andre Parker and Anthony Campanale, gathered information and interviewed all persons present. (App. 4a-5a.) No one present owned the house, or even knew who the owner was. (App. 119a.) Some told police that they were there for a birthday party, while others said it was a bachelor party. (App. 119a.) No one could identify the guest of honor either way. (App. 119a.) Several said that they had been invited by other people, and some said that a woman identified only as "Peaches" or "Tasty" had given them permission to be in the home.

(App. 119a.) "Peaches," though, was not present. (App. 119a.)

Officers took the time to further investigate. They called "Peaches" on the phone several times but she was "evasive" and repeatedly hung up. (App. 50a.) When an officer asked her to come to the home, she refused, explaining that she would be arrested if she did so. (App. 54a.) "Peaches" told police she had told the partiers that they could use the home. (App. 50a.) She also initially claimed to police that the owner had given her permission to use the home and that she was "possibly renting" it from him. (App. 50a, 54a.) Soon, though, "Peaches" admitted to police that, contrary to her initial claim, she lacked the owner's permission to use the home. (App. 50a.)

Police also spoke with the homeowner, who confirmed that no one, including "Peaches," had permission to be there. (App. 54a.) The homeowner explained that the home had been vacant since the last resident's death. (App. 37a.)

Based on all of this information, Sergeant Suber directed that the partiers be arrested for trespassing. (App. 6a.) Prosecutors later decided not to pursue charges against them. (App. 120a.)

B. District Court Proceedings.

Respondents—16 of the 21 individuals arrested—brought suit in the United States District Court for the District of Columbia, invoking jurisdiction under 28 U.S.C. § 1331. (App. 46a.) They claimed violations of the Fourth Amendment under 42 U.S.C. § 1983 and common-law torts, all based on the alleged lack of probable cause for their arrests. (App. 46a, 63a.) The named defendants included the two petitioner officers,

Parker and Campanale, and the petitioner District of Columbia. (App. 46a.)

After discovery closed, both petitioners and respondents moved for summary judgment. (App. 47a.) The district court granted respondents summary judgment on, *inter alia*, their Fourth Amendment and common-law false arrest claims against petitioners Parker and Campanale. (App. 100a-101a.) It found as a matter of law that the officers lacked probable cause to arrest for trespassing because "nothing about what the police learned at the scene suggests that the [respondents] 'knew or should have known that they were entering against the owner's will.'" (App. 64a (brackets omitted).) The court denied the officers qualified immunity, reasoning that the law was clear that such mental state was required for the offense. (App. 74a.)

After a damages-only trial, the court entered a $680,000 judgment against petitioners Parker and Campanale (and jointly against the petitioner District of Columbia for the common-law torts). (App. 121a & n.4.) It separately ordered petitioners Parker and Campanale to pay the respondents' attorneys' fees under 42 U.S.C. § 1988. (App. 121a.) This brought the total award against the two officers to nearly $1 million. (App. 121a.)

C. The Court of Appeals' Opinion.

A divided panel of the District of Columbia Circuit affirmed the district court's judgment.

The court of appeals found no probable cause for the arrests, applying the same analysis for the Fourth Amendment and common-law false arrest claims. (App. 7a-17a.) It stated that "in the absence of any conflicting information, Peaches' invitation vitiates [a]

necessary element" of trespass: that respondents knew or should have known that their entry was unauthorized. (App. 11a.) The court of appeals explained: "A reasonably prudent officer aware that [respondents] gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." (App. 11a.) According to the court, the homeowner's statement that respondents had entered unlawfully was not "sufficient" for probable cause since the homeowner "never said *that he or anyone else had told* [*respondents*] that they were" unwelcome. (App. 12a.)

The court of appeals rejected as "beside the point" the argument that officers need not "sift through conflicting evidence or resolve issues of credibility." (App. 12a n.4.) It did so because it thought officers did not "observe anything" supporting the mental state required for trespassing. (App. 12a n.4.) The court further explained that there was "no evidence that the officers asked either Peaches or [the homeowner] whether [*respondents*] knew that Peaches had no right to be in the house." (App. 12a n.4.) The court continued: "Had [the officers] asked such questions and gotten an affirmative answer, [then petitioners'] argument would carry weight." (App. 12a n.4.)

The court of appeals also dismissed some of the facts on which the officers relied for probable cause, thus necessarily finding that these facts did not constitute "conflicting information" that would permit officers to doubt the evidence of "Peaches' invitation." (*See* App. 11a.) It explained that "[t]o the extent that people scattered or hid when the police entered the house, such behavior may be 'suggestive' of wrongdoing, but is not sufficient standing alone to create probable cause." (App. 16a.) The court also rejected the view

that the vacant "condition of the house, on its own, should have alerted the [partiers] that they were unwelcome." (App. 16a.) Such condition, the court concluded, was "entirely consistent with" a belief that "Peaches" might be a new tenant. (App. 16a-17a.)

The court of appeals also upheld the denial of qualified immunity. (App. 21a-24a.) It recognized that no case had "invalidated an arrest for [trespassing] under similar circumstances" but held that "that is not the applicable standard." (App. 22a.) Instead, the court explained, it was enough that the law was clearly established in the following respects: that "probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense ... , including any state-of-mind element"; and that the state-of-mind element for trespassing is that a suspect knew or should have known that his entry was unwelcome. (App. 23a.) The court also rejected the officers' defense of privilege on the common-law false arrest claim "for essentially the same reasons" it rejected qualified immunity. (App. 30a.)

Judge Brown dissented, objecting to the "impossible standard for finding probable cause the court [adopted]." (App. 33a.) She explained that the "decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden ...." (App. 34a.) This heightened burden, under which "all but the most implausible claims of invitation must be credited," "radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of [suspects]." (App. 38a.) As Judge Brown noted, the

court's holding is contrary to the "very purpose of a totality of the circumstances inquiry," which is "to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances." (App. 38a.)

Judge Brown concluded that the "circumstances surrounding the arrest[s] were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful." (App. 37a.) She cited the following circumstances: the lawful owner had not permitted anyone to enter; the house was vacant and appeared so; the partiers ran and hid from police, gave police conflicting accounts about why they were there, and purported to rely on the invitation of someone who was not present; and when reached by phone, the purported inviter was uncooperative and untruthful with police. (App. 36a-39a.)

Judge Brown additionally opined that qualified immunity applied even if probable cause were lacking. (App. 41a-44a.) As she explained, the law had not previously required "officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." (App. 43a-44a.) To the extent that pre-existing law was "broadly comparable," Judge Brown concluded that it could reasonably support probable cause here. (App. 43a.)

D. The Court of Appeals' Denial of Rehearing En Banc.

Over a written dissent joined by four Circuit judges, the court of appeals denied rehearing en banc. In a statement concurring in the denial, the panel majority proclaimed that "there is nothing novel about our view." (App. 106a.) It characterized its opinion as recognizing that "so long as there is evidence giving rise to probable cause—even if that evidence is only circumstantial and short of preponderant—officers may lawfully arrest, no matter what a suspect claims in his or her own defense." (App. 106a.) The panel majority also insisted that its opinion recognizes the "important protection" of qualified immunity but "simply finds that a reasonable officer could not conclude, based on the information before *these particular officers*, that there was probable cause." (App. 107a.)

The dissenting statement by Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, indicated that petitioners had probable cause to arrest. (App. 122a, 138a.) Judge Kavanaugh opined that, in any event, the petitioner officers were at least entitled to qualified immunity. (App. 122a.) He believed rehearing en banc necessary because "the panel opinion will negatively affect the ability of ... police officers to make on-the-spot credibility judgments that are essential for officers to perform their dangerous jobs and protect the public." (App. 118a.)

Judge Kavanaugh disagreed with the panel opinion's probable cause standard. (App. 125a-126a.) He queried: "In a case like this where the actus reas is complete and the sole issue is the defendant's mens rea ... [,] are police officers always required to believe

the statements of the suspects ... ?" (App. 125a-126a.) Judge Kavanaugh recognized that the panel opinion "seems to say yes, at least for this kind of case." (App. 126a.) He explained that the panel opinion required officers to credit the suspects' statements "in the absence of any conflicting information" and that, under the panel's approach, reasonable doubts about the suspects' credibility "do not count as 'conflicting information.'" (App. 126a.)

Judge Kavanaugh wrote: "The panel opinion's approach is not and has never been the law." (App. 126a.) He noted that police officers "often hear a variety of mens rea-related excuses" from persons apparently engaged in criminal activity. (App. 126a.) In these situations, Judge Kavanaugh explained, "police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present." (App. 126a.) He noted that "[a]lmost every court of appeals has recognized that officers cannot be expectedly to *definitively* resolve difficult mens rea questions in the few moments" available to them. (App. 127a.)

Judge Kavanaugh further recognized that the "panel opinion in this case contravenes ... emphatic Supreme Court directives" in "11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals." (App. 116a-117a.) He explained that the panel opinion "did what the Supreme Court has repeatedly told us not to do: ... created a new rule and then applied that new rule retroactively against the police officers."

(App. 136a.) As he noted, "the most relevant D.C. trespassing cases *supported* arrest in this kind of case." (App. 134a-135a (citing *Artisst v. United States*, 554 A.2d 327, 330 n.1 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967)).) Moreover, it was "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." (App. 136a.) Judge Kavanaugh wrote: "Whatever the merits of the panel opinion's new rule—and I think it is divorced from the real world that police officers face on a regular basis—it is still a new rule." (App. 137a.) He concluded: "This should have been a fairly easy case for qualified immunity." (App. 136a.)

REASONS FOR GRANTING THE PETITION

I. The District Of Columbia Circuit's Heightened Probable Cause Standard Conflicts With The Standard Employed By Other Courts, And This Court's Fourth Amendment Jurisprudence Generally, On An Important And Recurring Issue.

A. The court of appeals' heightened probable cause standard deviates markedly from that employed by its sister circuits and state courts.

The District of Columbia Circuit held that a police officer lacks probable cause to arrest intruders for trespassing so long as the intruders claim an innocent state of mind—here, that they were invited by some person not present—unless there is "conflicting information." (App. 11a.) And although the officers here had reasonable circumstantial grounds to doubt the intruders' credibility, the court of appeals held that such grounds do not count as the "conflicting

information" it required for probable cause. (App. 11a-12a & n.4, 126a.) Instead, the panel majority equated "conflicting information" with direct, affirmative proof of a suspect's state of mind, such as a witness statement that the suspect acted with the requisite intent. (App. 12a & n.4, 33a-34a.) Other courts have held otherwise. They have ruled that officers need not accept an apparent trespasser's claim of an innocent state of mind when there is reason to doubt the credibility of the claim—even when that reason is an indirect one, as is often all that could be available.

In *Finigan v. Marshall*, 574 F.3d 57 (2d Cir. 2009), the Second Circuit held that probable cause existed to arrest despite the apparent trespasser's claim that she had a license or privilege to enter. *Id.* at 61-63. There, the officer learned that the suspect entered and took property from her former residence, in which her estranged husband, who had changed the locks, still resided but was away. *Id.* at 60. The suspect informed the officer "that she had legal title to the residence, that she was removing only her own property, and that her divorce attorney told her she could do so." *Id.*

The Second Circuit rejected the argument that the suspect's belief in her right to enter negated the criminal trespass element of a "knowing" unlawful entry and thus defeated probable cause. *Id.* at 63. The court explained that such argument "incorrectly assume[s] that an officer must have proof of each element of a crime and negate any defense before an arrest." *Id.* Even if the "evidence here might not persuade a jury to convict for criminal trespass because of [the suspect's] belief in her right of entry," the court explained that a police officer's function was "to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the

evidence." *Id.* The Second Circuit concluded that the probable cause threshold "was easily met." *Id.*

Similarly, in *Wright v. City of Philadelphia*, 409 F.3d 595 (3d Cir. 2005), the Third Circuit found probable cause to arrest a woman for trespassing even assuming she believed she had a lawful reason for her entry. *Id.* at 602-04. There, the woman entered a house where she had just been sexually assaulted, for the purpose of retrieving her clothes and gathering other items to prove she had been assaulted. *Id.* at 596-97, 602. The Third Circuit recognized that the officers "may have made a mistake" in disbelieving her explanation for her entry. *Id.* at 603. But the court ruled that such mistake was reasonable because some of the items the woman had retrieved were of "little or no evidentiary value" and were not promptly turned over to police. *Id.* The Third Circuit held that her explanation for entering was "not dispositive" of probable cause, which "looks to the totality of the circumstances" and does not require that officers' "determinations of credibility were, in retrospect, accurate." *Id.*

In *State v. Newcomb*, 20 A.3d 881 (N.H. 2011), the New Hampshire Supreme Court found probable cause for the defendant's arrest for trespassing despite his claim that he lacked knowledge his entry was unauthorized. *Id.* at 885-86. There, a police officer saw a truck parked in the driveway of a home whose owner was reportedly out of town. *Id.* at 884. When the officer approached, the defendant yelled something and got into a car. *Id.* The defendant told the officer he had come to the property with the owner's nephew. *Id.* Meanwhile, the nephew came out from behind the truck and explained to the officer that he was moving and planned to leave the truck on his

aunt's property until she returned. *Id.* Both men appeared nervous. *Id.* Speaking to the officer by phone, the owner stated that her nephew knew that he was not allowed on the property. *Id.*

Based on these facts, the New Hampshire Supreme Court found that the officer had "ample evidence suggesting that the defendant knew that he was not allowed on the premises." *Id.* at 885. This was so despite the defendant's suggestion that he was merely the unwitting companion of the owner's nephew. *Id.* at 884-85. The court emphasized that probable cause is a "commonsense rather than technical concept" and "deals with reasonable probabilities upon which officers must act quickly for the protection of society." *Id.* at 885-86.

Moreover, the reasoning in the District of Columbia Circuit's decision extends far beyond the trespassing context. By requiring a police officer to accept a suspect's claim of an innocent state of mind, even when reasonable circumstantial grounds exist to doubt the suspect's credibility, the decision conflicts more broadly with the probable cause standard in many other courts, which hold that officers may make reasonable credibility judgments and need not believe innocent explanations for conduct that otherwise appears criminal. Thus, these courts do not insist upon the type of "conflicting information"—direct, affirmative proof of a suspect's mental state—that the District of Columbia Circuit requires to overcome those explanations and establish probable cause. (*See* App. 11a-12a & n.4, 33a-34a, 126a.)

For example, the Sixth Circuit has held that a police officer "is under no obligation to give any credence to a suspect's story." *Criss v. Kent*, 867 F.2d 259, 263 (6th Cir. 1988). It has further held that a suspect's

"plausible explanation" should not "in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause." *Id.* (finding probable cause despite suspect's innocent explanation for association with stolen property); *accord Crockett v. Cumberland Coll.*, 316 F.3d 571, 581-83 (6th Cir. 2003).

The Seventh Circuit agrees. In *Marks v. Carmody*, 234 F.3d 1006 (7th Cir. 2000), it held that officers did not need to "accept as established the evidence [the suspect] had proffered that tended to show that he did not act with the requisite intent to defraud" since "[i]ssues of mental state and credibility are for judges and juries to decide." *Id.* at 1009. Likewise, the Eighth Circuit has ruled that "[i]t is usually not possible for an officer to be certain about a suspect's state of mind at the time of a criminal act," and an officer "need not rely on an explanation given by the suspect." *Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012) (finding probable cause despite innocent explanation for leaving restaurant without signing charge for bill).

The Fourth and Ninth Circuits have similarly held that the probable cause standard gives officers latitude to discount innocent explanations for suspicious behavior. *See Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (holding that a suspect's "innocent explanations for his odd behavior cannot eliminate suspicious facts from the probable cause calculus"); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) ("Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior. The test is not whether [his] conduct ... is consistent with innocent behavior; [police] officers do

not have to rule out the possibility of innocent behavior." (internal quotation marks omitted)).

Especially problematic for law enforcement officers in the District of Columbia, the District of Columbia Circuit's probable cause standard conflicts with the standard of the District of Columbia Court of Appeals. The latter has held that police are not required to credit a suspect's claim of an innocent mental state. *See Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 286 (D.C. 1974) (rejecting the contention that "the officer was obliged to believe the explanation of a suspected shoplifter" for suspicious conduct); *Prieto v. May Dep't Stores Co.*, 216 A.2d 577, 578-79 (D.C. 1966) (finding probable cause to arrest for theft where the plaintiff headed toward the clothing store exit with pajamas over her arm, even though the plaintiff told the officer that she had forgotten she had them and the plaintiff had a purse in which she could have concealed them if she had wanted); *see also Tillman v. Wash. Metro. Area Transp. Auth.*, 695 A.2d 94, 95-97 (D.C. 1997) (finding probable cause to arrest for entry of transit station without paying fare despite objective evidence of an innocent mental state).

This case would have been decided differently if it had arisen in these other courts. This Court should resolve the conflict in Fourth Amendment jurisprudence that the District of Columbia Circuit has created. And because all of the respondents' Section 1983 and common-law claims depended on the absence of Fourth Amendment probable cause (App. 7a, 30a, 63a), this Court should reverse all liability findings.

B. The court of appeals' heightened probable cause standard is contrary to this Court's established Fourth Amendment jurisprudence.

The District of Columbia Circuit's heightened probable cause standard—aptly described as an "impossible standard" by Judge Brown (App. 33a)—also contravenes this Court's precedent.

1. The court of appeals' standard is inconsistent with the "totality of the circumstances" test.

Probable cause is "a practical and common-sensical standard" that considers "the totality of the circumstances." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). It rejects "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id.* Yet the court of appeals' decision mandates that "all but the most implausible claims of invitation be credited" in assessing probable cause to arrest for trespassing. (App. 38a.) This inflexible approach excludes important facts from the probable cause calculus: reasons to doubt a suspect's claim of an innocent state of mind.

Here, an officer had objectively reasonable grounds to discredit the partiers' claimed belief that their entry into the house was authorized. The partiers were in a vacant home late at night, engaging in illicit behavior, without any owner or renter present. (App. 119a.) The partiers scattered and hid when uniformed officers knocked and entered the home. (App. 59a, 119a.) They gave police false and conflicting explanations for what they were doing in the house; they could not get their stories straight about whether they were there for a birthday party or a bachelor party, and they could

not identify the guest of honor. (App. 119a.) Some said they had been invited by other people, while some said that they had been invited by "Peaches" or "Tasty." (App. 119a.) When officers spoke by phone with "Peaches," she claimed that she had invited the partiers, but she was evasive and repeatedly hung up the phone. (App. 50a.) "Peaches" refused to come to the scene because she said she would be arrested. (App. 54a.) She attempted to mislead the police by claiming that she had the owner's authority to be in the home, before finally admitting that she had no such authority. (App. 50a, 54a.)

These facts discredited—and did not require officers to accept—the claim of a bona fide invitation. A reasonable officer could have believed that the partiers and "Peaches," furthering their common enterprise, concocted the alleged invitation either beforehand, anticipating that the partiers' presence might be questioned, or afterwards, once police arrived at the home. It was also reasonable to infer from these facts that, even if "Peaches" had conveyed an "invitation," she did so in a manner that alerted or suggested that she was without actual authority to do so. Alternatively, even if "Peaches" had not so much as hinted to the partiers about her lack of authority, a reasonable officer could infer, from all of the suspicious circumstances that night, that the partiers still knew, or at least should have known, that they were not allowed to be there. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("Th[e] process [of considering the totality of the circumstances] allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them ....").

Under the court of appeals' probable cause standard, these reasonable grounds to doubt the partiers' innocent explanation do not count. (App. 11a-12a & n.4, 126a.) The court of appeals' decision dismissed some of these suspicious facts by viewing them in improper isolation. It explained that the partiers' act of scattering and hiding upon the uniformed officers' arrival is "not sufficient *standing alone* to create probable cause." (App. 16a (emphasis added).) It likewise concluded that the vacant "condition of the house, *on its own*," would not have alerted the partiers that something was amiss. (App. 16a (emphasis added).) Viewing these facts in isolation from each other, and from the other objective bases to discredit the partiers' claim, violated the "totality of the circumstances" test. *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003).

The District of Columbia Circuit concluded that these reasonable credibility doubts are not the kind of "conflicting information" required in its view to overcome the claim of invitation and establish probable cause. (App. 11a.) As its decision makes clear, such "conflicting information" must be direct, affirmative proof, like a witness statement that the partiers had a culpable state of mind. (App. 11a-12a & n.4, 33a-34a, 126a.) This impractical and inflexible evidentiary requirement is the kind of rigid rule that is incompatible with the probable cause standard. *Harris*, 133 S. Ct. at 1055. It ignores this Court's instruction that, in assessing probable cause, courts should consider all of the circumstances. *Id.*

2. The court of appeals imposed too high a bar for probable cause, contrary to this Court's express warnings.

Probable cause "is not a high bar." *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014). It requires only the "k[i]nd of 'fair probability' on which 'reasonable and prudent people, not legal technicians, act.'" *Id.* (brackets omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Probable cause does not require "a prima facie showing" of criminal activity, *Gates*, 462 U.S. at 235, or "the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence ... have no place in the probable-cause decision." *Harris*, 133 S. Ct. at 1055 (brackets omitted) (quoting *Gates*, 462 U.S. at 235).

The court of appeals' test impermissibly departs from this Court's probable cause threshold. Under this Court's precedents, there was probable cause to believe that the partiers were trespassing. The objective elements of the crime were met: the partiers entered a private house against the will of the lawful owner. D.C. Code § 22-3302. The only element even in question was the state-of-mind element—whether they knew or should have known that their entry was against the owner's will. The officers took the time to investigate this element. They did not ignore the partiers' claim that they had been invited, but repeatedly contacted an uncooperative "Peaches," the alleged inviter. (App. 50a, 54a.) Upon investigation and based on all of the circumstances, a police officer could reasonably discredit the partiers' innocent explanation and infer that the state-of-mind element

was sufficiently satisfied. *See Pringle*, 540 U.S. at 372 (finding probable cause to arrest based on reasonable inference that "any or all three of the [car] occupants had knowledge of, and exercised dominion and control over, the cocaine" found behind a back-seat armrest); *Adams*, 407 U.S. at 148-49 (finding probable cause that suspect's possession of a gun was without a permit based on a reliable informant's tip that suspect had a gun and narcotics).

In holding otherwise, the court of appeals set the bar too high. Whether the partiers offered an explanation for their behavior that was "consistent with" an innocent mental state is not the test. (App. 15a-16a.) "[I]innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Gates*, 462 U.S. at 245 n.13. Even if accepting the innocent explanation would have been reasonable here, so too was drawing the contrary inference that the partiers knew or should have known that they were unwelcome. That is enough for probable cause. *See id.* at 245-46; *see also Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004) ("[T]he practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great.").

The court of appeals treated the probable cause determination as if it were the ultimate determination of guilt. Perhaps at a criminal trial, a judge or jury weighing the evidence might have concluded as did the court of appeals: the partiers' entry, though unauthorized, was not culpable. But it is the role of

the judge or jury, not the police officer, to finally determine guilt, including whether the accused acted with the "requisite intent." *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). Probable cause to arrest requires only a "fair probability" of wrongdoing—a standard met here.

C. Whether the probable cause standard allows officers to make reasonable credibility judgments is an important question that officers routinely face.

This case presents an important and recurring issue: the ability of police officers to make credibility judgments about a suspect's claimed mental state when assessing probable cause to arrest. This Court should correct the court of appeals' deviation from the well-established probable-cause analysis of its sister circuits upholding the ability of officers to make such credibility judgments. The court of appeals' rule limiting this ability will have a severe chilling effect on law enforcement, adversely affecting local and federal officers' everyday ability in the District of Columbia to do their difficult jobs and protect the public.

Police officers routinely confront claims of an innocent mental state regarding apparent trespassing. Under most if not all criminal trespass statutes, a bona fide, reasonable belief in the right to be on the property defeats the mental state requirement. 75 Am. Jur. 2d *Trespass* § 154 (2016). Such a belief might be based on an alleged invitation, as here. Other claims of right might rest on various asserted property interests. *See, e.g.*, *Zimmerman v. Doran*, 807 F.3d 178, 182-84 (7th Cir. 2015) (timber deed). Intruders might also assert a belief that they were on a public right-of-way, not private property. *See, e.g.*, *Bodzin v.*

City of Dallas, 768 F.2d 722, 723-25 (5th Cir. 1985). Alternatively, they might contend that they were simply unaware that their entry was unwelcome. For example, they might claim that they did not see "no trespassing" signs, or misunderstood that a prior owner's objection carried over to a new owner. *See, e.g., Borgman v. Kedley*, 646 F.3d 518, 524 (8th Cir. 2011).

The issue is not limited to trespassing but arises whenever a crime has a mental state requirement. As Judge Kavanaugh explained in voting for rehearing en banc, police officers "often hear a variety of mens rea-related excuses," to wit:

> "The drugs in my locker aren't mine." "I don't know how the loaded gun got under my seat." "I didn't realize the under-aged high school kids in my basement had a keg." "I wasn't looking at child pornography on my computer, I was hacked." ... "I punched my girlfriend in self-defense."

(App. 126a.) At the same time, police often have no witness able, or willing, to attest to the suspect's mental state. Officers must then judge the credibility of such innocent explanations, under difficult and uncertain circumstances, in the short time officers have to decide whether to arrest.

Requiring that officers credit a suspect's claim of an innocent mental state—even when the officer has an objectively reasonable basis to doubt the suspect's credibility—would create an enormous problem for law enforcement. The court of appeals' requirement fails to reflect the real world in which police officers function: one in which they must "approach such ambiguous facts and self-interested or unreliable

statements with an appropriately healthy dose of skepticism." (App. 38a.) The court of appeals' decision undercuts an officer's ability to use his or her experience, judgment, and direct observations to assess the credibility of a suspect's innocent explanation. Officers will second-guess themselves and forgo enforcement of the law, fearing that a judge, far removed from the scene and years later, might make a different credibility judgment and then hold them personally liable.

II. Even Assuming That Probable Cause Was Lacking, The Court Of Appeals' Decision Contravenes This Court's Precedent On Qualified Immunity Requiring That The Law Be Clearly Established In A Particularized Sense.

"Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), and citing *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013); and *Reichle v. Howards*, 132 S. Ct. 2088 (2012)); *accord Taylor v. Barkes*, 135 S. Ct. 2042 (2015); *Mullenix v. Luna*, 136 S. Ct. 305 (2015). It is important that this Court do so again here. The lower courts imposed summary judgment against the two petitioner officers and ordered them to pay nearly $1 million in damages and fees, even though the unconstitutionality of the officers' actions was not clearly established at the time (if it has been established at all). Because the court of appeals denied the officers' defense to the common-law false arrest claim for "essentially the same reasons" as

it denied qualified immunity (App. 30a), this Court should reverse all liability findings.

Qualified immunity applies if "a reasonable officer could have believed [the arrests] to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (brackets omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308. Rather, this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation ... the officer confronts.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

Like other courts of appeals that this Court has reversed in recent years, the District of Columbia Circuit failed to follow this Court's clear instructions regarding qualified immunity. It reasoned that the law was clearly established for present purposes, in that: (1) probable cause requires "some evidence" of each offense element, including the mental state requirement; and (2) the mental state requirement for trespassing is whether the person "knew or should have known that his entry was unwanted." (App. 23a.) Assuming that these two generalized propositions were clearly established at the time, this is not the level of specificity this Court requires. These two generalized propositions did not give fair notice to the petitioner officers whether probable cause to arrest existed in the specific situation they confronted:

persons behaving suspiciously inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim that they were invited by someone who is not present and is uncooperative and untruthful with police.

Neither the court of appeals nor the district court cited any case that had found probable cause lacking under even remotely analogous circumstances. Pre-existing case law instead supported the existence of probable cause in this situation. As discussed, other federal and state courts have held (and continue to hold) that probable cause exists to arrest for trespassing, even though the suspect asserted a good-faith claim of right, as long as a reasonable officer could disbelieve the suspect. *See Finigan*, 574 F.3d at 61-63; *Wright*, 409 F.3d at 602-04; *Newcomb*, 20 A.3d at 885-86. The same is true for other offenses when the suspect offers an innocent state-of-mind explanation. *See Criss*, 867 F.2d at 263; *Marks*, 234 F.3d at 1009; *Royster*, 698 F.3d at 688.

Similarly, decisions of the District of Columbia Court of Appeals support (and continue to support) probable cause to arrest for trespassing under similar circumstances. Those decisions have upheld trespassing *convictions* even though the accused had offered an innocent explanation for being on the property. *See McGloin*, 232 A.2d at 91 (upholding conviction of person found in non-public areas of a private apartment building though he told police he was looking for a cat or a friend who lived in the building); *Artisst*, 554 A.2d at 330 & n.1 (upholding conviction even though the accused claimed that he had entered dormitory to buy soccer equipment from a resident and thus lacked the requisite intent); *Kozlovska v. United States*, 30 A.3d 799, 800-03 (D.C.

2011) (upholding conviction of a woman previously barred from a building despite her unrebutted testimony that the superintendent permitted her to use the building, since the factfinder was free to disbelieve her testimony). Because such evidence permits a conviction, a reasonable officer could have concluded here that it satisfied the much lower standard of probable cause.

As discussed, decisions of the District of Columbia Court of Appeals at the time had also found probable cause to arrest despite, as here, a suspect's claim or evidence of an innocent mental state. *Nichols*, 322 A.2d at 285-86 (claim of lack of intent to steal because intent was to return item); *Prieto*, 216 A.2d at 578-79 (claim of lack of intent to steal because continued possession of item was inadvertent); *Tillman*, 695 A.2d at 95-97 (evidence suggesting mistaken entry into restricted area where gate normally demarcating area was missing and suspect promptly turned around). Relying on these cases, a reasonable officer could have believed the respondents' arrests were lawful.

It is "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* an arrest under D.C. law in these circumstances." (App. 136a.) The panel opinion acknowledged as much but then declared: "that is not the applicable standard" for qualified immunity. (App. 22a.) Of course, as the panel opinion noted, there is no need that "the very action in question have previously been held unlawful," and officers can violate clearly established law "even in novel factual circumstances." (App. 22a-23a (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002))). But the denial of qualified immunity still

requires that "in light of pre-existing law the unlawfulness [of the officer's actions] must be apparent." *Hope*, 536 U.S. at 739 (quoting *Anderson*, 483 U.S. at 640). In other words, existing precedent must have placed the constitutional question the officers confronted "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Existing precedent did not establish "beyond debate" that probable cause was lacking here. This is far from the "novel" or "obvious" factual situation where general constitutional principles might suffice to give an official fair notice of the unlawfulness of his or her conduct. *Cf. Hope*, 536 U.S. at 734-35 (involving the handcuffing of a prisoner to a hitching post in a painful position for several hours in the hot sun, shirtless, with little water and no bathroom breaks). Police officers often encounter the general type of situation here, where suspects offer innocent state-of-mind explanations for trespassing and other apparent criminal behavior. As discussed, the existing precedent addressing these circumstances supported, not undermined, probable cause. And four judges of the District of Columbia Circuit, considering the facts of this particular case, thought that there *was* probable cause. (App. 122a, 138a.) An officer cannot be deemed "plainly incompetent" for having shared their view. *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011).

As Judge Kavanaugh recognized, the court of appeals' decision "did what the Supreme Court has repeatedly told [the lower courts] not to do: The panel opinion created a new rule and then applied that new rule retroactively against the police officers." (App. 136a.) It is unfair to impose an award of nearly $1 million on the two petitioner officers simply

because they did not—and could not—anticipate the court of appeals' decision here. That decision not only split from the other federal courts of appeals that have considered this constitutional question but also departed sharply from the District of Columbia Court of Appeals cases supporting probable cause to arrest under these circumstances. Given this Court's precedents, this "should have been a fairly easy case for qualified immunity." (App. 136a.) The contravention of those precedents warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

765 F.3d 13; 412 U.S. App. D.C. 246;
2014 U.S. App. LEXIS 16893

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7127

THEODORE WESBY, ET AL.,

Appellees,

v.

DISTRICT OF COLUMBIA, ET AL.,

Appellants,

EDWIN ESPINOSA, OFFICER—METROPOLITAN POLICE DEPARTMENT, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ET AL.,

Appellees.

March 27, 2014, Argued
September 2, 2014, Decided

COUNSEL: Carl J. Schifferle, Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellants. With him on the briefs were Irvin B. Nathan, Attorney General, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, at the time the briefs were filed. Loren L. AliKhan, Deputy Solicitor General, entered an appearance.

Gregory L. Lattimer argued the cause and filed the brief for appellees.

JUDGES: Before: BROWN and PILLARD, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge PILLARD. Dissenting opinion filed by Circuit Judge BROWN.

OPINION BY: PILLARD

OPINION

PILLARD, *Circuit Judge*: A group of late-night partygoers responded to a friend's invitation to gather at a home in the District of Columbia. The host had told some friends she was moving into a new place and they should come by for a party. Some of them informally extended the invitation to their own friends, resulting in a group of twenty-one people convening at the house. With the festivities well underway, Metropolitan Police Department ("MPD") officers responded to a neighbor's complaint of illegal activity. When the police arrived, the host was not there. The officers reached her by phone, and then called the person she identified as the property owner, only to discover that the putative host had not finalized any rental agreement and so lacked the right to authorize the soiree. The officers arrested everyone present for unlawful entry. But because it was undisputed that the arresting officers knew the Plaintiffs had been invited to the house by a woman that they reasonably believed to be its lawful occupant, the officers lacked probable cause for the arrest. Nor was there probable cause to arrest for disorderly conduct because the evidence failed to show any disturbance of sufficient magnitude to violate local law. We accordingly affirm the district court's grant of summary judgment to Plaintiffs on the ground that

the arrests violated their clearly established Fourth Amendment rights and District of Columbia law against false arrest. Because the supervising police sergeant at the scene also overstepped clear law in directing the arrests, the district court also correctly held the District of Columbia liable for negligent supervision.

I.

The District of Columbia and two police officers in their individual capacities appeal the district court's liability determinations resulting from the grant of partial summary judgment against them. The court granted partial summary judgment in Plaintiffs' favor because, given the uncontroverted evidence of record regarding the information known to the sergeant and two of the officers at the time of the arrests, no reasonable officer in their shoes could have found probable cause to arrest any of the Plaintiffs. The court's grant of summary judgment was only partial, however, in several ways: First, the court denied Plaintiffs' motion for summary judgment against several other officers in the face of factual disputes about what they knew at the scene; the Plaintiffs then abandoned those claims and the court dismissed them with prejudice. Second, the court granted the Defendants' cross-motion for summary judgment on claims against all of the officers in their official capacities, dismissing those claims, too, with prejudice. Finally, the Plaintiffs' summary judgment motion was limited to liability, leaving remedial determinations to the jury. At a trial on damages, the jury awarded each Plaintiff between $35,000 and $50,000 in compensatory damages. The only questions on this appeal address the validity of the partial summary judgment liability holding.

For purposes of appeal of a grant of a plaintiff's motion for summary judgment, we view the facts in the light most favorable to defendants. In the early morning hours of March 16, 2008, the MPD dispatched officers to investigate a complaint of illegal activities taking place at a house in Washington, D.C. The officers heard loud music as they approached the house and, upon entering, saw people acting in a way they viewed as consistent "with activity being conducted in strip clubs for profit"—several scantily clad women with money tucked into garter belts, in addition to "spectators . . . drinking alcoholic beverages and holding [U.S.] currency in their hands." Some of the guests scattered into other rooms when the police arrived. The parties dispute how fully the house was "furnished," but the police observed at least some folding chairs, a mattress, and working electricity and plumbing.[1]

One of the Defendants-Appellants, Officer Anthony Campanale, took photographs of the scene and, along with other officers, interviewed everyone present to find out what they were doing at the house. The partygoers gave conflicting responses, with some saying they were there for a birthday party and others that the occasion was a bachelor party. Someone told Officer Campanale that a woman referred to as "Peaches" had given them permission to be in the house; others said that they had been invited to the party by another guest. Peaches was not at the house.

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[1] The record also contains inconsistencies regarding what, if any, contraband the police found. For example, the arrest report says that Officer Parker recovered marijuana inside the house, but he acknowledged in his deposition that he smelled—but did not find—marijuana. Moreover, nothing in the record indicates that any of the officers observed any drug-related activity.

Nobody who was present claimed to live there or could identify who owned the house.

Another Defendant-Appellant, Officer Andre Parker, spoke to a woman who told him that Peaches "was renting the house from the grandson of the owner who had recently passed away and that [the grandson] had given permission for all individuals to be in the house." The woman then used her cell phone to call Peaches. Officer Parker spoke to Peaches, who refused to return to the house because she said she would be arrested if she did. When Officer Parker asked who gave her permission to be at the house, Peaches told Officer Parker that he could "confirm it with the grandson." Officer Parker then used the same phone to call the apparent owner, identified in the record only as Mr. Hughes, who told Officer Parker that he was trying to work out a lease arrangement with Peaches but had yet to do so.[2] Hughes also told Officer Parker that the people in the house did not have his permission to be there that evening.

Sergeant Andre Suber, an MPD supervisor who was acting as the watch commander that night, arrived on the scene after the officers had begun their investigation. The officers briefed Sergeant Suber, including telling him about Parker's conversations with Peaches and Hughes. Sergeant Suber also spoke to Peaches directly by phone. According to Sergeant Suber, Peaches told him that "she was possibly renting the house from the owner who was fixing the house up for her" and that she "gave the people who were inside the place, told them they could have the bachelor party."

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[2] The record does not make clear how Officer Parker obtained Hughes's contact information or whether, at the time of the arrests, the police had made any independent efforts to verify that Hughes was in fact the owner of the house.

As the police continued to talk to Peaches, she acknowledged that she did not have permission to use the house. On that basis—and notwithstanding the undisputed statements of both the guests and Peaches that she had given them permission to be at the house—Sergeant Suber ordered the officers to arrest everyone for unlawful entry.

After the police arrested and transported the partygoers to the police station, Sergeant Suber and the lieutenant taking over as watch commander discussed the appropriate charges for the Plaintiffs. According to Sergeant Suber, the lieutenant decided to change the charge to disorderly conduct after speaking with a representative from the District of Columbia Attorney General's office. Sergeant Suber disagreed, but the lieutenant overruled him. The officers who had been at the house, including Sergeant Suber, each testified that they had neither seen nor heard anything to justify a disorderly conduct charge.

Sixteen of the arrestees sued five officers for false arrest under 42 U.S.C. § 1983, the officers and the District for false arrest under common law, and the District for negligent supervision. On cross-motions for partial summary judgment as to liability, the district court granted the parties' motions in part and denied both motions on some issues. The court ruled in favor of the Plaintiffs on their claims of false arrest against Officers Parker and Campanale in their individual capacities, and on the common law false arrest and negligent supervision claims against the District. Defendants appeal these liability determinations.

II.

We review de novo a district court's summary judgment ruling, "apply[ing] the same standard of review applicable to the underlying claims in the district court." *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918, 382 U.S. App. D.C. 312 (D.C. Cir. 2008). A party is entitled to summary judgment where, "viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in the nonmoving party's favor," *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 4, 398 U.S. App. D.C. 43 (D.C. Cir. 2011), this Court determines that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

We begin with Plaintiffs' entitlement to summary judgment on their Section 1983 and common-law false arrest claims. Because "[t]he elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim," we address the merits of those claims together. *See Scott v. District of Columbia*, 101 F.3d 748, 753-54, 322 U.S. App. D.C. 75 (D.C. Cir. 1996) (citing *Dellums v. Powell*, 566 F.2d 167, 175, 184 U.S. App. D.C. 275 (D.C. Cir. 1977)). As with most false arrest claims, Plaintiffs' claims "turn on the issue of whether the arresting officer[s] had probable cause to believe that [Plaintiffs] committed a crime." *Id.* at 754. Defendants argue that the district court erred in finding the arrests unsupported by probable cause because, in their view, the officers had objectively valid bases to arrest the Plaintiffs both for unlawful entry and disorderly conduct. In the alternative, Defendants contend that, even if probable cause were lacking, the officers are shielded from liability by qualified

immunity and a common-law privilege. We address these contentions in turn.

A.

The assessment of probable cause is an objective one. An arrest is supported by probable cause if, "at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

Based on the undisputed facts relevant to the knowledge the police had at the time of the arrests, and "giv[ing] due weight to inferences drawn" by the officers, we consider de novo whether those facts support a determination of probable cause to arrest. *Ornelas v. United States*, 517 U.S. 690, 697, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). Defendants contend that they were justified in arresting Plaintiffs for unlawful entry and disorderly conduct. To determine whether they had probable cause to believe that Plaintiffs were violating District of Columbia law, we look to District law to identify the elements of each of those offenses. *See Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). Upon examination of the relevant statutes and case law, we conclude that no reasonable officer could have concluded that there was probable cause to arrest Plaintiffs for either crime.

Unlawful Entry. At the time of Plaintiffs' arrests, District of Columbia law made it a misdemeanor for a person to, "without lawful authority, . . . enter, or attempt to enter, any public or private dwelling,

building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof." D.C. Code § 22-3302 (2008).[3] To sustain a conviction for unlawful entry, the government must prove that "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter." *Culp v. United States*, 486 A.2d 1174, 1176 (D.C. 1985).

The probable-cause inquiry in this case centers on the third and fourth elements, which together identify the culpable mental state for unlawful entry. *See Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013). Specifically, the question is whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known they had entered the house "against the will of the lawful occupant or of the person lawfully in charge thereof," and intended to act in the face of that knowledge. D.C. Code § 22-3302; *see Ortberg*, 81 A.3d at 305; *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989).

Probable cause "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). But the police cannot establish probable cause without at least *some* evidence supporting the

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[3] Both the unlawful-entry statute (D.C. Code § 22-3302) and the disorderly-conduct statute (D.C. Code § 22-1321) have been amended since the events at issue here. Throughout this opinion, we refer to the versions of the statutes in effect during the relevant time period.

elements of a particular offense, including the requisite mental state. *United States v. Christian*, 187 F.3d 663, 667, 337 U.S. App. D.C. 402 (D.C. Cir. 1999). Because the offense of parading without a permit, for example, requires knowledge that no permit issued, "officers who make such an arrest must have reasonable grounds to believe" that the suspects knew no permit had been granted. *Carr v. District of Columbia*, 587 F.3d 401, 410-11, 388 U.S. App. D.C. 332 (D.C. Cir. 2009).

In this case, the officers on the scene had three pieces of information that could bear on whether the Plaintiffs knew or should have known that they had entered a house against the owner's express will. First, the officers had Plaintiffs' statements that they had been invited to some kind of party at the house, with inconsistent and conflicting statements about the type of party. Second, the officers had explicit, uncontroverted statements from Peaches and a guest at the scene that Peaches had told the people inside the house that they could be there. Finally, the officers had a statement by the claimed owner of the house that he had been trying unsuccessfully to arrange a lease with Peaches and that he had not given the people in the house permission to be there.

As a preliminary matter, Defendants argue that Peaches' invitation is irrelevant to the determination of probable cause, because whether the Plaintiffs had a bona fide belief in their right to enter the house "simply raises a defense for the criminal trial." That argument misses the mark. The District of Columbia Court of Appeals recently reiterated that "the existence of a reasonable, good faith belief [in permission to enter] is a valid defense *precisely because it precludes the government from proving what it must*—that a

defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 309 (emphasis added).

It is true that, if prosecuted for unlawful entry, a defendant may raise as a defense that he entered the building "with a good purpose and with a bona fide belief of his right to enter." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971); *see United States v. Thomas*, 444 F.2d 919, 926, 144 U.S. App. D.C. 44 (D.C. Cir. 1971); *Ortberg*, 81 A.3d at 308-09. But the cases interpreting the unlawful-entry statute are clear and consistent that such a defense is available precisely because a person with a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" by the statute. *Smith*, 281 A.2d at 439; *see also McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967) (dismissing concern about unintentional violations of the statute, because "one who enters for a good purpose and with a bona fide belief of his right to enter is not guilty of unlawful entry"); *Bowman*, 212 A.2d 610, 611-12 (D.C. 1965) ("[O]ne who enters . . . for a good purpose and with bona fide belief of his right to enter . . . would not be guilty of an unlawful entry . . . .").

Thus, contrary to Defendants' argument, Peaches' invitation is central to our consideration of whether a reasonable officer could have believed that the Plaintiffs had entered the house unlawfully. That is because, in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of Plaintiffs' intent to enter against the will of the lawful owner. A reasonably prudent officer aware that the Plaintiffs gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully.

Ignoring the significance of Peaches' invitation, Defendants argue that Hughes's statement that he had not given the Plaintiffs permission to be in the house is dispositive because a homeowner's denial that he has given permission to enter his property is sufficient to establish probable cause to arrest for unlawful entry. We disagree. Importantly, Hughes never said *that he or anyone else had told the Plaintiffs* that they were not welcome in the house. Peaches eventually admitted that *she* did not have permission to be in the house or to invite others, but there is no evidence that she had told the Plaintiffs as much. Indeed, the evidence is uniform that the arrestees all were invited, and there is simply no evidence in the record that they had any reason to think the invitation was invalid. All of the information that the police had gathered by the time of the arrest made clear that Plaintiffs had every reason to think that they had entered the house with the express consent of someone they believed to be the lawful occupant.[4] Accordingly, there was no probable

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[4] For this reason, Defendants' contention that arresting officers are not required to "sift through conflicting evidence or resolve issues of credibility" is beside the point. Multiple officers on the scene testified that they did not observe anything leading them to believe that the Plaintiffs had any reason to think they lacked the right to be in the house. There is also no evidence that the officers asked either Peaches or Hughes whether the *Plaintiffs* knew that Peaches had no right to be in the house. Had they asked such questions and gotten an affirmative answer, Defendants' argument would carry weight. *See Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005) (officers entitled to discredit Section 1983 plaintiff's innocent explanation for entry into a house in the face of conflicting evidence); *Dahl v. Holley*, 312 F.3d 1228, 1234 (11th Cir. 2002) (probable cause to make an arrest based on inculpatory statements by a reliable informant, notwithstanding exculpatory statements from the suspect that "tended to discredit [the informant's] version of events").

cause for the officers to believe that the Plaintiffs entered the house knowing that they did so against the will of the owner or occupant.

The cases on which Defendants rely do not compel a different conclusion. Citing to *McGloin*, 232 A.2d 90, and *Culp*, 486 A.2d 1174, Defendants argue that Hughes's statement was sufficient because "[t]he offense of unlawful entry does not require any kind of prior warning in the case of a private dwelling." Br. for Appellants 22. *Culp* and *McGloin* establish that an owner of a private dwelling need not post any sign or warning in order to express an intent to exclude the general public. *See Culp*, 486 A.2d at 1177 (probable cause for unlawful entry where the building is vacant and "the property itself reveals indications of a continued claim of possession by the owner or manager"); *McGloin*, 232 A.2d at 91 ("[S]urely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry."). But those cases do not apply here, because the Plaintiffs did not simply find a house that appealed to them and walk in off the street; they entered the specified home at the invitation of someone they reasonably believed was an authorized inhabitant.

Defendants' reading of *Culp* and *McGloin* would provide probable cause to arrest for unlawful entry any individual in a private dwelling without the express permission of the owner. Such a rule would transform the unlawful-entry statute from one barring entry "against the will of the owner" into one criminalizing entry "without the express invitation of the owner." A brunch host who overstays her lease does not thereby expose her invited guests to arrest for unlawful entry, nor does a person summoned onto

property by a stranger who appears to be the lawful inhabitant commit the crime of unlawful entry if she reasonably fails to recognize that the stranger is not the owner at all, but a traveling salesman. What the unlawful-entry law requires is some showing that the individual entered a place that she knew or should have known she was not entitled to be.

The cases Defendants cite merely recognize that certain factual circumstances not present here make it reasonable to infer an interloper's intent to enter against the will of the owner. *McGloin*, for example, upheld an unlawful-entry conviction where the defendant entered an apartment building, ran up the fire escape and then onto the roof, and said first that he was looking for his cat and then "for a friend named DeWitt who lived in the building," when no one by that name lived there. 232 A.2d at 90. In his defense, McGloin relied on *Bowman*, where the court held that an entry into a semi-public space was not unlawful unless the owner had given an express "warning to keep off," which could be expressed verbally or "by sign." *See McGloin*, 232 A.2d at 91 (quoting *Bowman*, 212 A.2d at 611). Distinguishing *Bowman*, the court emphasized that McGloin entered "not a public or semi-public building," but an apartment building containing four private family dwellings. *Id.* Under such circumstances, it was "more than plain that wandering through the building, climbing on the roof or perching on the fire escape would be against the will of the owner." *Id.*

Culp addressed what inferences the police may reasonably draw when a person enters a property that appears to be vacant. In that case, the police saw three men, including the defendant, inside a "dilapidated" public housing property. *See Culp*, 486 A.2d at 1175.

The men tried to leave through the back door when they saw the police approaching, and the defendant "could not explain his presence" when the officers asked what he was doing there. *Id.* Culp challenged his arrest for unlawful entry on the basis that the police lacked probable cause to believe that he knew he was entering the house against the will of the occupant. *See id.* The court found that the officers had probable cause to arrest Culp because "there were sufficient indications of efforts by [the housing authority] to protect the property against intruders that the officers could reasonably conclude that [Culp] knowingly entered against the will of the person lawfully in charge." *Id.* at 1177 (quotation marks and ellipsis omitted). The housing authority had made "continuous and diligent efforts to board up the house" and at least some of the windows remained boarded up when Culp entered. *Id.*

The arresting officers in this case, unlike those in *McGloin* and *Culp*, observed nothing inconsistent with the reason the Plaintiffs gave for being there—a reason that was corroborated, rather than undermined, by the information that Peaches gave to the officers: Peaches had invited them to her new apartment. Defendants point to the "highly suspicious and incriminating" activities the officers observed in the house to bolster the argument that the officers had no reason to credit the Plaintiffs' explanation for their presence. But the officers acknowledged that, other than the ostensible unlawful entry, they did not see anyone engaging in illegal conduct. Moreover, the activities they did observe—scantily clad women dancing, bills slipped into their garter belts, and people drinking—were consistent with Plaintiffs' explanations that they were there for a bachelor or birthday

party.[5] To the extent that people scattered or hid when the police entered the house, such behavior may be "suggestive" of wrongdoing, but is not sufficient standing alone to create probable cause. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) (noting that unprovoked flight "is not necessarily indicative of wrongdoing," but is suggestive enough that, given other circumstances, may justify further investigation). To the extent that the party involved semi-nude dancing or stripping, it is hardly surprising that participants would retreat as officers entered off the street.

As the district court explained, this is not a case in which "the property was boarded up, door latches were broken, no trespassing signs were posted or the manner of securing the property indicated that the owner wanted others to keep out." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 33 (D.D.C. 2012). Notwithstanding the parties' dueling characterizations of how furnished and inhabited the house appeared, there is nothing in the record suggesting that the condition of the house, on its own, should have alerted the Plaintiffs that they were unwelcome. To the contrary, that the house had sparse furnishings and functioning utilities was entirely consistent with one individual's statement to Officer Parker that

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[5] In their brief, Defendants suggest that the evidence "showed that the suspects were using the house for unlawful activities, including drug use and prostitution" and cite to a variety of criminal statutes prohibiting that type of conduct. Br. for Appellants 30. Notably, however, Defendants do not attempt to justify Plaintiffs' arrests on any of those grounds, and entirely ignore that the officers uniformly testified that they did not see any evidence of drugs or similar illegal activity.

Peaches was the new tenant in a house previously occupied by the owner's recently deceased grandfather.

It bears emphasizing that Defendants are incorrect to suggest that our conclusion could render the unlawful-entry statute "unenforceable in most circumstances" or leave the police "powerless to make arrests for unlawful entry" in analogous situations. Br. for Appellants 24. The police were by no means powerless in this case. At a minimum, after speaking with Hughes and determining that he had not given Peaches permission to use the house, the officers could have told the Plaintiffs that they lacked permission to be there and so must leave. Had the officers "personally asked [the Plaintiffs] to leave and [the Plaintiffs] had refused," such a refusal would have supplied the probable cause the officers needed to make an arrest for unlawful entry. *District of Columbia v. Murphy*, 631 A.2d 34, 38 (D.C. 1993); *see id.* at 37 ("The offense of unlawful entry includes . . . cases where a person who has entered the premises with permission subsequently refuses to leave after being asked to do so by someone lawfully in charge.").

In sum, when faced with the facts and circumstances presented in this case—and, in particular, without any evidence that the Plaintiffs knew or should have known they were in the house against the will of the owner or lawful occupant—a reasonable officer could not have believed there was probable cause to arrest the Plaintiffs for unlawful entry.

Disorderly Conduct. Defendants argue in the alternative that the officers had probable cause to arrest the Plaintiffs for disorderly conduct. At the time of the Plaintiffs' arrests, the relevant statute made it a crime to "shout[] or make[] a noise either outside or

inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons," either with the intent "to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." D.C. Code § 22-1321(3) (2008). The "breach of the peace" clause qualifies the remainder of the statute "and sets forth an essential element of the offense." *In re T.L.*, 996 A.2d 805, 810 (D.C. 2010).

Plaintiffs point to the evidence in the record that the arresting officers themselves did not believe there was evidence to support a disorderly conduct charge. As long as the arresting officers "had an objectively valid ground upon which" to make an arrest, however, the subjective knowledge and intent of the officers is irrelevant. *United States v. Bookhardt*, 277 F.3d 558, 566, 349 U.S. App. D.C. 317 (D.C. Cir. 2002); *see Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Thus, even where police do not believe evidence suffices, or are unsure which of several offenses the suspect may have committed, an arrest is valid so long as, on the facts of which the officers were aware, an objective observer can discern probable cause. *See, e.g.*, *United States v. Broadie*, 452 F.3d 875, 881, 371 U.S. App. D.C. 499 (D.C. Cir. 2006) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004)); *Bookhardt*, 277 F.3d at 566; *United States v. Prandy-Binett*, 995 F.2d 1069, 1073-74, 302 U.S. App. D.C. 1 (D.C. Cir. 1993); *see also Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (Sotomayor, J.) ("[W]hen faced with a claim for false arrest, we focus on the validity of the arrest, and not on the validity of each charge."). Defendants are thus correct that the arresting officers' subjective belief that they lacked probable cause to arrest the Plaintiffs for disorderly conduct is not dispositive. What matters

is whether, on the facts the officers knew at the time, a reasonably prudent officer could have found that the Plaintiffs were engaging in disorderly conduct. *See Whren*, 517 U.S. at 813; *Bookhardt*, 277 F.3d at 566.

The officers here, however, accurately estimated the evidence as inadequate to support probable cause to believe that the Plaintiffs' conduct was disorderly. As the district court recognized, some evidence suggested "the police were told of reports of a loud party or loud music and some officers heard loud music upon arrival." *Wesby*, 841 F. Supp. 2d at 34. But Defendants exaggerate the nature and quantum of that evidence as showing that Plaintiffs had "disturbed the tranquility and nighttime slumber of the community residents." Br. for Appellants. The evidence on which Defendants rely shows nothing more than that one neighbor had called to complain about noise that evening.[6] A disorderly conduct violation under District

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[6] To the extent that the Defendants rely on Officer Campanale's trial testimony, that testimony was not before the district court at summary judgment and therefore is not part of the record on review of the grant of summary judgment. *See Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 (6th Cir. 2009); *U.S. East Telecommc'ns, Inc. v. U.S. West Commc'ns Servs., Inc.*, 38 F.3d 1289, 1301 (2d Cir. 1994). On the other hand, to the extent that Defendants refer to statements in the summary judgment record reflecting complaints from neighbors about the noise emanating from the house, such evidence is entitled to our consideration. Plaintiffs object to some of that evidence based on the prohibition against hearsay. *See Greer v. Paulson*, 505 F.3d 1306, 1315, 378 U.S. App. D.C. 295 (D.C. Cir. 2007) ("[S]heer hearsay . . . counts for nothing on summary judgment." (internal quotation marks omitted)). But those statements would not be admitted for their truth (e.g., whether there was in fact loud music) but instead to show what information the officers had about the nature and scope of the disturbance at the time of the arrest. *See Fed. R. Evid.* 801(c); *Royall v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 145, 383 U.S. App. D.C. 331

of Columbia law requires that an arrestee disturbed a "considerable number of persons" and acted "under circumstances such that a breach of the peace may" have been occasioned by that arrestee's conduct. D.C. Code § 22-1321 (2008); *In re T.L.*, 996 A.2d at 808-09 (concluding that defendant did not create "breach of the peace" within the meaning of the statute despite the fact that "some ten to fifteen people left their town houses" in order to observe the "clamor" that defendant caused by yelling loudly on the street). Even viewing it, as we must, in the light most favorable to the Defendants, the evidence here simply does not rise to that level.[7]

For all of these reasons, we conclude that the officers lacked probable cause to arrest the Plaintiffs for unlawful entry or disorderly conduct.

(D.C. Cir. 2008) (considering, on summary judgment, evidence contested as hearsay on the basis that statements were not offered for the truth of the matter asserted); *see also Draper v. United States*, 358 U.S. 307, 311-12, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) (rejecting contention that officers may not consider hearsay in probable cause assessment). As our discussion makes clear, however, that evidence is relevant to the legal determination of probable cause. *See, e.g., United States v. Branch*, 545 F.2d 177, 184-85, 178 U.S. App. D.C. 99 (D.C. Cir. 1976) (emphasizing that the probable cause determination in Draper, though based in part on hearsay evidence, was appropriate because that evidence "was explicitly detailed and corroborated by events as they transpired").

[7] Our conclusion that there was insufficient evidence for a reasonable officer to conclude that the noise from the house had disturbed a considerable number of people necessarily forecloses Defendants' argument that "there was probable cause to believe the plaintiffs, as a group, had engaged in disorderly conduct." *See* Br. for Appellants 33 (citing *Carr*, 587 F.3d at 407).

B.

Having concluded that Plaintiffs' arrests were unsupported by probable cause, we must consider whether qualified immunity shields the officers from liability. "An officer is entitled to qualified immunity, despite having engaged in constitutionally deficient conduct, if, in doing so, she did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Brosseau v. Haugen*, 543 U.S. 194, 205, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). If Officers Parker and Campanale had "an objectively reasonable basis for believing that the facts and circumstances surrounding [Plaintiffs'] arrest were sufficient to establish probable cause," *Wardlaw v. Pickett*, 1 F.3d 1297, 1304, 303 U.S. App. D.C. 130 (D.C. Cir. 1993) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)), they would be immune from Plaintiffs' suit for damages.

As with all cases examining whether a particular right was sufficiently clear, "[w]e begin by establishing the appropriate level of generality at which to analyze the right at issue." *Johnson v. District of Columbia*, 528 F.3d 969, 975, 381 U.S. App. D.C. 351 (D.C. Cir. 2008); *see, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Here, the question is whether, in light of clearly established law and the information that Officers Parker and Campanale had at the time, it was objectively reasonable for them to conclude that there was probable cause to believe Plaintiffs were engaging in either unlawful entry or disorderly conduct. *See Wilson*, 526 U.S. at 615. This inquiry into

the "objective legal reasonableness" of the officers' actions parallels but does not duplicate the reasonableness aspect of the Fourth Amendment probable cause analysis. *See Johnson*, 528 F.3d at 976 (describing the two *Saucier* steps as "distinct but overlapping").

To determine whether the officers "strayed beyond clearly established bounds of lawfulness," *id.*, we look first to "cases of controlling authority," *Youngbey v. March*, 676 F.3d 1114, 1117, 400 U.S. App. D.C. 177 (D.C. Cir. 2012) (quoting *Wilson*, 526 U.S. at 617). It is not enough to reiterate that the Fourth Amendment's restrictions against arrest without probable cause are clearly established; the inquiry must be made more contextually, at a finer level of specificity. At the same time, "[w]e need not identify cases with materially similar facts, but have only to show that the state of the law at the time of the incident gave the officer[s] fair warning" that their particular conduct was unconstitutional. *Johnson*, 528 F.3d at 976 (brackets, ellipsis, and quotation marks omitted).

Turning first to the claim of false arrest for unlawful entry, we conclude that no reasonable officer could have believed there was probable cause to arrest Plaintiffs for entering unlawfully where, as here, there was uncontroverted evidence that Plaintiffs believed they had entered at the invitation of a lawful occupant. Defendants argue that, because no case identified by Plaintiffs had "invalidated an arrest for unlawful entry under similar circumstances," it was not clearly established that arresting Plaintiffs for unlawful entry was unconstitutional. But that is not the applicable standard. Qualified immunity need not be granted every time police act unlawfully in a way that courts have yet to specifically address. *See, e.g., Safford*

Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009) ("To be established clearly, . . . there is no need that the very action in question have previously been held unlawful." (brackets and internal quotation marks omitted)); *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

The law in this jurisdiction has been well established for decades that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element. *See, e.g.*, *Carr*, 587 F.3d at 410-11; *Christian*, 187 F.3d at 667. Under District of Columbia law, criminal intent is a necessary element of the offense of unlawful entry. A person who has a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" to violate the unlawful-entry statute. *Smith*, 281 A.2d at 439. Notwithstanding Defendants' suggestion to the contrary, *see* Oral Arg. Rec. at 5:40-5:52, District of Columbia unlawful-entry law predating the conduct in this case plainly required that a suspect "knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308 (collecting cases); *see also id.* at 307-08 (explaining that, although "lack[ing] some precision," prior discussions of "the mental states for entry and for doing so 'against the will' of the lawful occupant are both clearly discernible and distinct").

The controlling case law in this jurisdiction therefore made perfectly clear at the time of the events in this case that probable cause required some evidence that

the Plaintiffs knew or should have known that they were entering against the will of the lawful owner. Defendants are simply incorrect to suggest that the officers could not have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry. *See Harlow*, 457 U.S. at 819 ("[A] reasonably competent public official should know the law governing his conduct.").

The same analysis holds true with respect to the clarity of the Fourth Amendment right against false arrest for disorderly conduct. Defendants contend that the law was not clearly established at the time of Plaintiffs' arrests because there was no case law interpreting the specific provision of the statute on which Defendants rely. They correctly point out that the first case from the District of Columbia Court of Appeals interpreting subsection (3) of D.C. Code § 22-1321 was decided after the arrests in this case. *See In re T.L.*, 996 A.2d at 810 ("This is the first prosecution under subsection (3) of the statute that has come to our attention."). But the plain text of that provision requires the disturbance of a "considerable number of persons." D.C. Code § 22-1321(3). Whatever a "considerable number of persons" means, surely it must mean something more than a single individual. And yet there is no evidence in this case that the loud music the officers heard when approaching the house disturbed anyone other than one neighbor who had complained.

Put differently, we believe that the language of the disorderly conduct statute, standing alone, was sufficient to give fair notice that there was no probable cause to make an arrest under these circumstances. We do not doubt, as the *In re T.L.* court acknowledged, that some parts of that provision may "pose their own

interpretive issues." 996 A.2d at 810. That does not mean, however, that distinct elements of the offense were unclear in the absence of case law interpreting the statute. *See United States v. Lanier*, 520 U.S. 259, 266-67, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (analogizing clearly established standard to fair warning principles in the context of criminal prosecutions, and noting that "the touchstone is whether the statute, *either standing alone or as construed*, made it reasonably clear at the relevant time that the defendant's conduct was criminal" (emphasis added)); cf. *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (noting that "the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*").

Finally, we reject Defendants' arguments that Officers Parker and Campanale cannot be held liable under Section 1983 because (1) they followed Sergeant Suber's order to arrest the Plaintiffs, and (2) they were not each individually responsible for each of the Plaintiffs' arrests.

An officer is not necessarily entitled to qualified immunity simply because he relies on a supervisor's decision to arrest. In evaluating the objective legal reasonableness of an officer's position for purposes of qualified immunity, approval by a superior officer is "pertinent" but not "dispositive." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249, 182 L. Ed. 2d 47 (2012); cf. *Malley v. Briggs*, 475 U.S. 335, 345-46, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (rejecting the notion that approval of a warrant by a neutral magistrate automatically establishes qualified immunity,

and requiring instead that the officer exercise his own "reasonable professional judgment"). Defendants argue to the contrary primarily in reliance on *Elkins v. District of Columbia*, 690 F.3d 554, 402 U.S. App. D.C. 247 (D.C. Cir. 2012), in which we held that an inspector from the Historic Preservation Office, a government agency "charged with protecting the city's historic structures," was entitled to qualified immunity for her unlawful seizure of the plaintiff's notebooks. *Id.* at 559, 567-68. *Elkins* held that, although the inspector had been personally involved in the unconstitutional seizure, it was reasonable for her not to know that her actions were unlawful. *See id.* at 568 ("The appropriate question for us to ask is whether it would have been clear to a reasonable official in [the inspector's] situation that seizing [the plaintiff's] notebook was unlawful."). Significantly, the inspector in that case was not a law enforcement officer at all, but "a junior member of the search team present to take pictures in an inspection led by police and her superiors." *Id.* Moreover, the *Elkins* court emphasized in granting qualified immunity that, although the inspector ultimately "relied upon the judgment of her supervisor and the police officer in charge," she did not blindly follow their orders. *Id.* Rather, she first "asked [them] about the permissible scope of the search." *Id.* Based on those and other factors, the court concluded that her actions, "though mistaken, were not unreasonable." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)).

The circumstances here, unlike in *Elkins*, do not show the officers' unquestioning reliance on Sergeant Suber's arrest order to be reasonable. *See id.* at 569 ("Whether an official's reliance [on her supervisor] is reasonable will always turn on several factors . . . .").

In contrast to the historic preservation investigator in *Elkins*, Officers Parker and Campanale are police officers with the independent authority to make arrests while on patrol. Indeed, had Sergeant Suber not come out to the scene, they would have had to make the arrest determinations on their own. Police officers charged with enforcing the criminal statutes are expected to know the limitations on their authority, *see Harlow*, 457 U.S. at 819, and, as discussed above, a reasonably competent officer faced with the information the officers had gathered in this case should have known that he lacked probable cause to make an arrest.

This is also not a case, like *Elkins* and the decisions cited therein, in which the defendant officers played little or no role in the investigation. *See Elkins*, 690 F.3d at 569 (citing, by way of example, a case in which officers did not play a "key role in the overall investigation"). Here, Officers Parker and Campanale were actively involved in surveying the scene and gathering information regarding the Plaintiffs' knowledge and reason for being in the house, and Officer Parker spoke to both Peaches and Hughes by phone. Both officers, moreover, were aware of the key uncontroverted facts in this case: that Peaches had invited the Plaintiffs to the house, and that the Plaintiffs had no reason to doubt that Peaches had the right to extend such an invitation. Under these circumstances, it was not reasonable for the officers to rely on Sergeant Suber's unlawful decision to arrest the Plaintiffs. Yet another factor present in *Elkins* but missing in this case is that neither Officer Parker nor Officer Campanale raised the question—to Sergeant Suber or anyone else—whether there was evidence that the Plaintiffs knew or should have known that their presence in the house was unauthorized. Indeed, there is no evidence in the

record suggesting that Officer Parker or Officer Campanale in fact disagreed with Sergeant Suber's determination that there was probable cause for an arrest but carried out the arrests because they were under orders to do so.

That the officers were apparently as confused or uninformed about the law as their supervisor does not make it reasonable for them to have arrested the Plaintiffs in reliance on his flawed assessment. Cf. *Malley*, 475 U.S. at 346 n.9 ("The officer . . . cannot excuse his own default by pointing to the greater incompetence of the magistrate."); *Messerschmidt*, 132 S. Ct. at 1252 (Kagan, J., concurring in part and dissenting in part) (2012) ("[W]hat we said in *Malley* about a magistrate's authorization applies still more strongly to the approval of other police officers . . . ."). This Court has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was "just following orders." *See generally Hobson v. Wilson*, 737 F.2d 1, 67, 237 U.S. App. D.C. 219 (D.C. Cir. 1984) (statement denying petition for rehearing) (per curiam) (rejecting with "no hesitation" the defendants' argument, raised for the first time in petition for rehearing, that the existence of an illegal policy excused low-level government officials from liability). Indeed, "[i]n its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights." *Id.* For good reason, this Court has never adopted such a rule.

That leaves us with the contention that Officers Parker and Campanale cannot be held liable because they did not personally arrest each of the Plaintiffs.

But Defendants' argument misapprehends the applicable legal standard for causation in the Section 1983 context. As this court has recognized, the Plaintiffs were required to "produce evidence 'that each [officer], through [his] own individual actions, has violated the Constitution.'" *Elkins*, 690 F.3d at 564 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Here, the cause of the group arrest was the investigation and erroneous determination regarding probable cause. Both Officers Parker and Campanale were the hub of that investigation: they gathered evidence, including photographs of the people in the house, and actively participated in questioning the Plaintiffs and other key witnesses such as Hughes and Peaches. *See id.* at 566-68 (assessing whether the evidence showed that the individual officers caused the unlawful seizure, and noting in one instance that the defendant's actions were "instrumental to the seizure"). In this context, that is sufficient to establish causation. *See, e.g.*, *KRL v. Estate of Moore*, 512 F.3d 1184, 1193 (9th Cir. 2008) (denying qualified immunity to an officer who relied on a facially invalid warrant in conducting a search because he played "an integral role in the overall investigation" that led to the issuance of the defective warrant); *Hall v. Shipley*, 932 F.2d 1147, 1154 (6th Cir. 1991) (recognizing general rule that mere presence is insufficient to create liability, but upholding denial of qualified immunity based on record evidence that the officer had been "the prime mover" in obtaining the search warrant and "participated in the search once inside the dwelling" (internal quotation marks omitted)); *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (officers who did not physically perform pat-down but who "remained armed on the premises throughout the entire search"

could be held liable under Section 1983 as "participants rather than bystanders").

Because the common-law privilege Defendants invoke overlaps with but is harder to establish than qualified immunity, the Defendants' argument on that score "fails for essentially the same reasons already set forth." *District of Columbia v. Minor*, 740 A.2d 523, 531 (D.C. 1999) (noting that the standard for common-law privilege "resembles the section 1983 probable cause and qualified immunity standards . . . (with the added clear articulation of the requirement of good faith)"); cf. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012) (explaining that although the officer "need not demonstrate probable cause in the constitutional sense" for privilege to attach, the officer must show "(1) he or she believed, in good faith, that his or her conduct was lawful, and (2) this belief was reasonable" (brackets and internal quotation marks omitted)). Accordingly, we affirm the district court's judgment insofar as it relates to Plaintiffs' Section 1983 and common-law false arrest claims.

III.

Finally, we address the District's claim that the district court erred in granting summary judgment to the Plaintiffs on their common-law negligent supervision claim. The District makes two arguments in support of its contention that the district court erred. First, the District contends that the negligent supervision claim must fail because the arrests were supported by probable cause, so either the standard of care was met or there was no underlying tort. That argument, however, is foreclosed by our conclusion that the officers lacked probable cause to arrest the Plaintiffs.

Second, the District argues that it was entitled to summary judgment on this claim because the Plaintiffs failed to present expert testimony regarding the standard of care. We disagree. District of Columbia law requires expert testimony only where "the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *Godfrey v. Iverson*, 559 F.3d 569, 572, 385 U.S. App. D.C. 140 (D.C. Cir. 2009) (quoting *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000)). Moreover, although the District correctly points out that courts often require expert testimony where the training and supervision of police officers is concerned, *see* Br. for Appellants 43 (citing cases), the fact that the supervising official was on the scene and directed the officers to make the unlawful arrests distinguishes this case from those in which expert testimony has been required. *See Godfrey*, 559 F.3d at 573 (no expert testimony required where "the individual with supervisory authority (Iverson) was *present* when his employee (his personal bodyguard Kane) committed the tortious acts"); *District of Columbia v. Tulin*, 994 A.2d 788, 797 (D.C. 2010) (no expert testimony required where police sergeants were on the scene and authorized arrest without inquiring into "critical information" about the incident).

Indeed, the undisputed facts in this case demonstrate that Sergeant Suber, one of the District's supervisory officials, directed his subordinates to make an arrest that he should have known was unsupported by probable cause. That is sufficient to entitle the Plaintiffs to judgment as a matter of law on their negligent supervision claim. *See Phelan v. City of Mount Rainier*, 805 A.2d 930, 937-38 (D.C. 2002) ("To establish a cause of action for negligent supervision,

a plaintiff must show: that the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." (internal quotation marks omitted)).

* * *

For the foregoing reasons, we affirm the district court's judgment.

So ordered.

DISSENT BY: BROWN

DISSENT

BROWN, *Circuit Judge*, dissenting:

The court today articulates a broad new rule—one that essentially removes most species of unlawful entry from the criminal code. Officers must *prove* individuals occupying private property know their entry is unauthorized; otherwise police lack probable cause to make arrests. Moreover, any plausible explanation resolves the question of culpability in the suspects' favor. Thus, unless the property is posted with signs or boarded up and attempts to prevent access have been deliberately breached, *i.e.*, there is direct evidence of unauthorized entry, law enforcement's options are limited to politely asking any putative invitee to leave.

I respectfully dissent.

I

Summary resolution is inappropriate where—as here—the probable cause determination turns on close questions of credibility, as well as the reasonability of inferences regarding culpable states of mind that

officers draw from a complicated factual context. *See Media Gen., Inc. v. Tomlin*, 387 F.3d 865, 871, 363 U.S. App. D.C. 280 (D.C. Cir. 2004) ("[Where] the material facts are susceptible to divergent inferences . . . the [] Court ha[s] no basis upon which to grant summary judgment.").

The Court concludes that, as a matter of law, no reasonably prudent officer could believe Plaintiffs entered unlawfully because the undisputed evidence shows an individual with (illusory) authority invited their entry, vitiating Plaintiffs' formation of the requisite intent. Maj. Op. at 11. Yet the mere presence of an invitation by one with ostensible authority is not dispositive if, under the totality of the circumstances, the officers could still conclude the suspects knew or reasonably should have known their invitation was against the will of the lawful owner. *See Ortberg v. United States*, 81 A.3d at 308 (D.C. 2013). The absence of direct, affirmative proof of a culpable mental state is not the same thing as undisputed evidence of innocence.

The court relies on two primary precedents to raise the bar, but neither *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013) nor *United States v. Christian*, 187 F.3d 663, 337 U.S. App. D.C. 402 (D.C. Cir. 1999) justifies the impossible standard for finding probable cause the court now proposes. Channeling Dr. Frankenstein, the court cobbles together a few recognizable parts to build a grotesque and unnatural whole. In *Ortberg*, the court recognized a bona fide belief in the right to enter as a defense to a charge of unlawful entry. *Ortberg* was not a probable cause case; it confirmed that all elements of unlawful entry, including requisite criminal intent, are necessary to sustain a conviction, while emphasizing that bona fide

belief must have some reasonable basis. It is "not sufficient that an accused merely *claim* a belief of a right to enter." *Id.* at 309, n.12.

United States v. Christian does impose a higher probable cause standard but that case is distinguishable. First, *Christian* involved a specific intent crime. *See generally Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[A]n officer need not have probable cause for every element of an offense[,]. . . however, when specific intent is a required element of the offense, the arresting officer must have probable cause for that element."). Second, *Christian* did not require direct evidence. The court cited *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), acknowledging that the circumstances surrounding an arrest may support the necessary inference of unlawful possession. *Christian*, 187 F.3d at 667. The problem with the government's argument in *Christian* was not the absence of direct proof of criminal intent, it was the absence of any evidence whatsoever of unlawful possession. "[T]he officers [therefore] lacked probable cause to believe a crime had been committed." *Id.*

Today's decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden that the Court declines to specify. The Court's decision broadly extends *Ortberg* and *Christian* to apply standards designed for materially disparate contexts to the probable cause inquiry for general intent crimes. Cf. *Pierce v. United States*, 402 A.2d 1237, 1246 n.2 (D.C. Cir. 1979) ("Sentences out of context rarely mean what they seem to say."). As a result, the Court finds officers may only lawfully arrest suspects

for unlawful entry where the officers have evidence affirmatively proving each element of an offense, including clear proof of what the suspect knew or reasonably should have known. *But* cf. 1 Corinthians 2:11 ("For who knows a person's thoughts except their own spirit within them?"). This is tantamount to an invitation to abuse vacation rentals or houses being marketed for sale or lease where prospective tenants can gain entry and retain or misappropriate a key or a lockbox combination, or leave a point of entry unsecured. Such a heightened threshold is not called for under our precedents. For general intent crimes, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). The proper inquiry is not whether the element of knowledge was conclusively satisfied; it is instead whether, based on the totality of the circumstances, officers could reasonably believe Plaintiffs committed the offense of unlawful entry.

The Court concludes there was insufficient evidence to support arrest because the evidence that Plaintiffs were invitees was uncontradicted, noting the presence of semi-nude dancing and the semi-furnished state of the home are consistent with Plaintiffs' contentions of their innocent attendance at a party. Maj. Op. at 15-16. A jury might credit Plaintiffs' depiction of events, their claims of innocent reliance upon a credible invitation, and conclude they lacked knowledge of the unlawfulness of their entry. However, for purposes of summary judgment, Plaintiffs' lack of knowledge must not be merely "consistent" with the evidence gathered by the police. Instead, Plaintiffs' lack of knowledge must be the only reasonable inference the officers could draw.

Here the totality of the circumstances could cause reasonable minds to question whether Plaintiffs were as blameless as the attendees of a Sunday brunch whose imprudent host has overstayed her lease. *Contra* Maj. Op. at 13 (finding this case indistinguishable from such a scenario). The officers responded to a call reporting illegal activity in a home at least some residents of the neighborhood knew to be vacant. As the officers entered, the partygoers' first response was to scatter into different rooms or hide. The house's interior was bare and in disarray; beyond fixtures or large appliances, it contained only folding chairs and food, and one room upstairs had a bare mattress and lighted candles—along with "females . . . that had provocative clothing on with money in . . . their garter belt[s]." Parker Dep. 14:12-16.[1]

After rounding up and interviewing the partygoers, the officers found their claim to lawful entry was an invitation from the house's supposed tenant, Peaches, who was "throwing a party." However, Peaches was not actually present when the officers arrived on the scene. The partygoers also gave inconsistent explanations for the party to which they had allegedly been invited. Some claimed to be attending a birthday party while others insisted it was a bachelor's party; in any event, none could identify the guest of honor.

When ultimately reached by telephone, Peaches admitted to inviting various partygoers, and claimed she had permission to enter, an assertion she quickly

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[1] The Court characterizes such minimalist furnishings as consistent with a new tenant. Maj. Op. at 16. But the sparseness of the house's decor is also consistent with a temporarily unoccupied home; a venue choice that reasonably discerning guests might find somewhat abnormal—though perhaps not conclusively so—for a run-of-the-mill house party.

recanted in a series of conflicting answers she made to investigators before becoming evasive and hanging up. The officers also confirmed from the actual owner that the house had been vacant since its last resident's death, the current owner was attempting to rent the property out, and neither Peaches nor anyone else had the owner's permission to enter or use the premises.

The totality of the evidence does not need to show the officers' beliefs regarding the unlawfulness of Plaintiffs' entry were "correct or more true than false. A practical, nontechnical probability . . . is all that is required." *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983). The surrounding context may not convince a jury to find probable cause. But likewise, taken in the light most favorable to the officers, the facts are not so clear cut that no reasonable officer could believe the partygoers knew or should have known Peaches' invitation was not credible or that their entry into the home was not properly authorized.

This is not a case where officers "turn[ed] a blind eye toward potentially exculpatory evidence in an effort to pin a crime on someone." *Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999). Nor did officers lack "any" evidence Plaintiffs committed the offense of unlawful entry. *See Christian*, 187 F.3d at 667. The circumstances surrounding the arrest were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful.

"[T]he real key . . . [to probable cause] is how [an] observed transaction fits into the totality of the circumstances." *Jefferson v. United States*, 906 A.2d 885, 888 (D.C. 2006) (noting observation of a one-way transfer of an unidentified object can, in some cases,

support probable cause for an unlawful two-way exchange of drugs for money). The officers did not ignore Plaintiffs' potentially exculpatory claims of invitation. *See Fridley v. Horrighs*, 291 F.3d 867, 874-75 (6th Cir. 2002) (officers may not ignore exculpatory facts that tend to negate an element of an offense). Instead, during the course of a fast-moving investigation, officers considered and investigated Plaintiffs' statements, and rendered a determination that their claims of bona fide good faith were insufficiently credible to overcome the surrounding facts and circumstances. *See Minch v. D.C.*, 952 A.2d 929, 937-38 (D.C. 2008) (noting police suspicion was reasonably based on appellant's evasiveness and equivocation, particularly in a fast-moving investigation).

The very purpose of a totality of the circumstances inquiry is to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances. *Cf. Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."). The Court's holding to the contrary ensures that all but the most implausible claims of invitation must be credited and radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of intruders who claim to have been "invited" and have not overtly forced their entry into a home.

In light of the facts known to the officers at the time of the arrests, summary judgment is unwarranted on the question of probable cause for unlawful entry. From their investigation, the officers knew the house was an unoccupied private rental dwelling, which would likely not require a sign or express warning forbidding entry. *See McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). They further determined none of the Plaintiffs owned or rented the house; that the property was, in fact, vacant; and the true owner had provided neither the partygoers nor any tenants with permission to enter, *see Culp v. United States*, 486 A.2d 1174, 1177 n.4 (D.C. 1985) ("[T]he arresting officers' knowledge that the property is vacant and closed to the public is material to a determination of probable cause."). Plaintiffs' party was taking place in a home so sparsely furnished as to be consistent with a vacant building; the guests' immediate response to the presence of police was to run and hide, an action suggestive of consciousness of guilt; the partygoers gave conflicting accounts about "why" the party was being held; and they purported to rely on an invitation from a "tenant" who was not actually present. When reached by telephone the "tenant" gave conflicting accounts as to her own permission to access the home, finally admitted she lacked any right to use the house, and—upon further questioning—became evasive and yelled at officers before hanging up.

Based on this evidence, taken in the light most favorable to the officers, a reasonable person could disbelieve Plaintiffs' claim of innocent entry based on a credible invitation. *See Parsons v. U.S.*, 15 A.3d 276, 280 (D.C. 2011) ("[T]he informant's general credibility and the reliability of the information he or she provides are important factors in a probable cause assessment"); *see also United States v. Project on Gov't*

Oversight, 454 F.3d 306, 313, 372 U.S. App. D.C. 110 (D.C. Cir. 2006) ("Evaluation of the credibility of witnesses must be left to the factfinder, and the need to assess the credibility of witnesses is precisely what places this dispute outside the proper realm of summary judgment."). A rational juror could find the officers reasonably believed Plaintiffs either knew, or should have known, Peaches' invitation was unauthorized and that use of the house was not otherwise permissible.

At its fringes probable cause is a nebulous construct. *See Jefferson v. United States*, 906 A.2d 885, 887 (D.C. 2006). ("The probable-cause standard is incapable of precise definition . . . because it deals with probabilities and depends on the totality of the circumstances."). In factually complex circumstances, like the present one, the probable cause inquiry requires weighing the credibility of statements from multiple parties and witnesses, and consideration of the reasonable inferences officers may draw from idiosyncratic facts. Resolution of such a credibility laden and fact specific inquiry is properly reserved for the jury. The Court errs in concluding such a case is appropriate for preliminary resolution at summary judgment. *See George v. Leavitt*, 407 F.3d 405, 413, 366 U.S. App. D.C. 11 (D.C. Cir. 2005) ("[A]t the summary judgment stage, a judge may not make credibility determinations, weigh the evidence, or draw inferences from the facts-these are jury functions, not those of a judge ruling on a motion for summary judgment. . . . Although a jury may ultimately decide to credit the version of the events described by [a defendant] over that offered by [a plaintiff], this is not a basis upon which a court may rest in granting a motion for summary judgment.").

More troubling still, by subverting the appropriate standard for probable cause, the Court effectively excises unlawful entry from the District's criminal code for cases where intruders claim they were invited and have not obviously and forcibly obtained entrance to a currently unoccupied private dwelling. Such a conclusion is not compelled by either our case law or common sense; officers are simply not required to credit the exonerating statements of suspected wrongdoers where the totality of the circumstances suggests such claims should be treated with skepticism.

II

Even assuming Plaintiffs' arrests were not supported by adequate probable cause for unlawful entry, qualified immunity shields the officers from individual liability for Plaintiffs' section 1983 claims because the officers' "conduct [did] not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (emphasis added); *see also DeGraff v. D.C.*, 120 F.3d 298, 302, 326 U.S. App. D.C. 270 (D.C. Cir. 1997) ("[T]he scope of qualified immunity must be evaluated using the [] 'objective reasonableness' criteria.").

For purposes of qualified immunity, "'[c]learly established' . . . means that "[t]he contours of the right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). While, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful," *id.*, courts should nonetheless "examine the asserted right at a relatively high

level of specificity, and on a fact-specific, case-by-case basis," *O'Malley v. City of Flint*, 652 F.3d 662, 668 (6th Cir. 2011). And in reviewing the pre-existing law, the officers' "unlawfulness must be apparent" to support a finding that qualified immunity does not apply. *Wilson*, 526 U.S. at 615; *Wardlaw v. Pickett*, 1 F.3d 1297, 1301, 303 U.S. App. D.C. 130 (D.C. Cir. 1993) (suggesting the "unlawfulness of the defendants [must be] so apparent that no reasonable officer could have believed in the lawfulness of his actions").

Here the pre-existing law of unlawful entry is not so clear that a reasonable officer would have known he lacked probable cause to arrest Plaintiffs. The officers were faced with an unusual factual scenario, not well represented in the controlling case law. The property where Plaintiffs were found was somewhere between an occupied private dwelling and a vacant or abandoned building. The situation the officers encountered rests uneasily between two distinct strands of District law. *Compare McGloin*, 232 A.2d at 91 ("[N]o one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.") *with Culp*, 486 A.2d at 1177 (noting boarded windows gives sufficient warning an abandoned building should not be entered).[2]

Neither line of cases unambiguously controls. The law of unlawful entry for abandoned properties has traditionally dealt with obviously decrepit buildings, *e.g.*, *Culp*, 486 A.2d at 1175 (noting the house was missing a rear door, its windows were shattered, and

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[2] The Court finds it "important[]" there was no evidence the home's true owner told Plaintiffs they were not welcome. Maj. Op. at 11. It is unclear from the case law, however, such a warning is required for a temporarily unoccupied but not obviously abandoned residence. *See McGloin*, 232 A.2d at 90-91.

the interior was in "shambles"), while unlawful entry of private dwellings has generally dealt with traditionally occupied residences, apartments, or semi-public buildings. *See, e.g.*, *McGloin*, 232 A.2d at 91; *Bowman v. United States*, 212 A.2d 610, 611-12 (D.C. 1963). Neither line of cases encompasses a scenario where individuals claim to be the social guests of a tenant of a (vacant) property to which the tenant has no actual possessory interest—much less a scenario where the putative tenant is herself not present on the scene and refuses to otherwise cooperate with officers' ongoing investigation. Moreover, to the extent the pre-existing law is broadly comparable, a reasonable person could find it supports an officer's finding of probable cause where a trespassers claim of invitation is deemed insufficiently credible. *See*, *e.g.*, *McGloin*, 232 A.2d at 90-91 (upholding the conviction of person found in nonpublic areas of a private apartment building, despite his excuse he was looking for a cat or a friend who lived in the building); *Kozlovska v. United States*, 30 A.3d 799, 800-801 (D.C. 2011) (upholding the conviction of a woman who claimed an employee permitted her to use the building).

Thus, in the absence of pre-existing case law clearly establishing the contours of Plaintiffs' rights, the officers were shielded by qualified immunity when, acting under color of state law, they reasonably arrested plaintiffs for unlawful entry. The case law of course requires officers to have some evidence the alleged trespassers committed the offense of unlawful entry. *See* Maj. Op. at 21-22. Yet nothing in the District's law requires officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such

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claims. The officers were therefore entitled to the protection of qualified immunity and the "breathing room" it gives them to make reasonable—albeit potentially mistaken—judgments under novel circumstances unexplored by the law when they took the challenged action. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011).

APPENDIX B

841 F. Supp. 2d 20;
2012 U.S. Dist. LEXIS 5680

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 9-cv-501 (RLW)

THEODORE WESBY, ET AL.,

Plaintiffs,

vs.

DISTRICT OF COLUMBIA, ET AL.,

Defendants.

January 18, 2012, Decided
January 18, 2012, Filed

COUNSEL: For Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Ethelbert Louis, Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., Stanley Richardson, Plaintiffs: Gregory L. Lattimer, Lead Attorney, Law Offices Of Gregory L. Lattimer, PLLC, Washington, DC.

For District Of Columbia, Edwin Espinosa, Officer - Metropolitan Police Department, in both his official and individual capacities, J. Newman, Officer - Metropolitan Police Department, in both his official

and individual capacities, A. Campanale, Officer - Metropolitan Police Department, in both his official and individual capacities, Andre Parker, Officer - Metropolitan Police Department, in both his official and individual capacities, Faraz Khan, Officer - Metropolitan Police Department, in both his official and individual capacities, Defendants: Denise J. Baker, Lead Attorney, Office of the Attorney General for District of Columbia, Civil Litigation, Washington, DC.

JUDGES: Robert L. Wilkins, United States District Judge.

OPINION BY: Robert L. Wilkins

MEMORANDUM OPINION

In the present action, sixteen Plaintiffs bring claims against the District of Columbia and five officers (Edwin Espinosa, Jason Newman, Anthony Campanale, Andre Parker and Faraz Khan) of the District of Columbia Metropolitan Police Department ("MPD"). (Doc. 1, Compl. ¶¶ 19-24.) In Count I of the complaint, Plaintiffs bring a civil rights false arrest claim pursuant to 42 U.S.C. § 1983 ("Section 1983") against the five officers in their individual capacities.[1] In Count II, Plaintiffs assert a state common law claim for false arrest against the five officers, and also against the District of Columbia ("District") on the basis of *respondeat superior*. Count III alleges negligent supervision solely against the District.

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[1] Plaintiffs originally brought the Section 1983 claim against the officers in their official capacities as well, but Plaintiffs have now clarified that they are proceeding against the officers solely in their individual capacities. (Doc. 33, Pls.' Summ. J. Response 4.) Therefore, all of Plaintiffs' Section 1983 official capacity claims will be dismissed with prejudice.

Presently before the Court are cross motions for summary judgment. The Defendants seek summary judgment on all claims. (Doc. 31.) Plaintiffs likewise seek summary judgment on all claims. (Doc. 25.)[2]

For the reasons set forth below, the Court finds that both motions are due to be granted in part and denied in part.

I. FACTS

A. Overview

The overall facts are generally undisputed. In the early morning hours of Saturday, March 15, 2008, Plaintiffs were attending a gathering at 115 Anacostia Avenue, N.E., in Washington, D.C.[3] At approximately 1:30 a.m., officers from the D.C. Metropolitan Police Department (MPD) arrived at the house in response to a call about the property. The officers entered the

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[2] The electronic docket entries for Plaintiffs' pleadings in opposition to Defendants' motion and in support of Plaintiffs' motion specifically list some, but not all, of the sixteen Plaintiffs. (*See* Doc. 25, 32.) Defendants therefore seek dismissal of all claims asserted by the Plaintiffs who were not listed on the electronic docket. While it would have been preferable if Plaintiffs had addressed this issue in their briefs, the Court is not willing to dismiss the claims asserted by some Plaintiffs based solely on notations that appear on the electronic docket, particularly since the text of Plaintiffs' pleadings indicate that they were filed on behalf of all Plaintiffs, Plaintiffs' arguments are not specifically tailored to each individual Plaintiff, and the Defendants cite no rule or precedent indicating that the failure to list every Plaintiff in the text of the electronic docket entry justifies such drastic relief.

[3] Although the complaint, (Compl. ¶ 25), and Defendants' undisputed facts, (Defs' Statement of Facts #8), indicate that the property was located on "Anacostia Road," the police report and property records indicate that the property is located on "Anacostia Avenue." (Defs.' Exs. A, E.)

residence and spoke to the Plaintiffs, an assortment of twenty-one men and women (sixteen of whom are Plaintiffs in this action). Several of the women were scantily dressed and had currency tucked into their garments. None of the Plaintiffs owned the home, but one or more of the Plaintiffs informed one or more of the police officers that a woman named "Peaches"[4] had invited the Plaintiffs to the house for a bachelor party. When an officer spoke to Peaches via telephone, she indicated she had given the Plaintiffs permission to hold a bachelor party at the house. However, the officer later spoke to the purported owner of the home and he indicated that, while he had discussed leasing the property to Peaches, she did not have a lease for the property and that the Plaintiffs did not have his permission to be in the house.

At some point during the investigation, Sergeant Suber arrived at the house and took control of the situation. Upon learning that Peaches did not have permission from the owner to occupy the property, Sgt. Suber made the decision to arrest the Plaintiffs for unlawful entry.[5] Suber is not a defendant in this action.

After Plaintiffs were taken to the police station, they were eventually released at the direction of the watch commander, Lieutenant Netter, who disagreed with Suber's decision regarding the unlawful entry arrests. Before the Plaintiffs could depart, however, Netter ordered the arrest of Plaintiffs for disorderly conduct[6] for using "loud voices," based on advice or direction

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[4] Apparently Peaches also goes by the name "Tasty." (*See* Doc. 31, Defs.' Summ. J. Br. 6; Hunt Dep. 8-9; Chittams Dep. 11-12.)

[5] *See* D.C. Code § 22-3302.

[6] *See* D.C. Code § 22-1321.

from a representative of the District of Columbia Office of the Attorney General ("Attorney General" or "OAG"). Neither Lieutenant Netter nor the attorney from the OAG have been named as Defendants in this action.

Although Suber objected and informed Netter that the disorderly conduct charge was not appropriate, Netter failed to reverse his decision. Suber and the other officers who were at the scene have since testified that they did not observe any activities consistent with a disorderly conduct charge. Between the time spent detained at the house, at the police station, and in lock up on the disorderly conduct charges, each Plaintiff was in police custody a total of several hours. The disorderly conduct charges were later dropped as to each Plaintiff.

That was a summary. Because the role of each officer, the reasonableness of each officers' actions, the state of the collective knowledge of the officers, and other particularized issues have been raised, set forth below are more detailed descriptions of the evidence from the accounts of several key police officer witnesses and an arrest report.

B. Sergeant Andre Suber

Sergeant Suber admits he made the decision to arrest the Plaintiffs for unlawful entry on the night in question. (Suber Dep. 24.) After some of the officers had already entered the property, Sergeant Suber arrived at the scene and entered the house, which had working electricity. (Suber Dep. 11.) In the course of his debriefing, he asked the officers if the owner of the property was on the scene and they said no. (Suber Dep. 17.) He then asked those present if someone was renting the house and "they" began to tell him about

Peaches who "claimed to be renting the house," but no one present could provide proof of such rental and Peaches was not on the scene. (*Id.* 17.) Suber then asked who gave the Plaintiffs permission to entertain at the house and "no one at the location could provide [him] a name or number of an owner. They only gave a name of . . . Peaches." (*Id.* 18.) Suber further testified:

> A: We called Peaches several times on the phone, a female. We asked her, "Who gave you permission to be inside this house?" She said no one. She said she was possibly renting the house from the owner who was fixing the house up for her. *And that she gave the people who were inside the place, told them they could have the bachelor party.*
>
> . . . .
>
> I asked her again who gave her permission to give them permission to come into an establishment or house that's not under her control. The [sic] she became evasive and hung up the phone.
>
> . . . .
>
> I called her back. She again began yelling and saying she had permission—she didn't know the owner's name, but she had permission to be inside the residence because she was going to rent the place out. Then she hung up. . . . [We got her on the telephone again and] she stated that she didn't have permission to be inside the location. *At that time they all were there unlawfully.*
>
> Q. So she told them that they could be there right?

A. Yes.

Q. Okay. And then you all determined that she didn't have the right to tell them that they could be there right?

A. Yes, sir.

Q. And then because she told them—gave them misinformation, you then arrested the people who thought they had a legal right to be there?

A. If a person comes to a location, it's upon them, their responsibility, to find out if they can in fact be at the residence lawfully.

. . . .

Q. *And it did not matter whether or not they believed, based on what Peaches told them, that they had a right to be there?*

A. *Peaches nor the other individuals occupying that location did not have the right to be there.*

(*Id.* 18-19, 39) (emphasis added).

Around the time of the arrests Suber apparently informed the night watch commander, who was at another location, about the course of events and she was "okay" with his "decision" to arrest Plaintiffs for unlawful entry. (Suber Dep. 31.) Around 5:00 a.m., the next watch commander, Lieutenant Netter, came on duty at the precinct. (*Id.* 28, 31.) While the order of events is somewhat unclear, Netter consulted with other upper level officers and decided he was going to release the Plaintiffs, to which Suber responded by providing Netter with the unlawful entry statute. (*Id.* 28-29.) Netter decided "he didn't care, and that he was

going to release these people," to which Suber responded "You're the watch commander, I'm a sergeant, you have that authority and I don't." (*Id.* 28-29, 39-40.)

At some juncture, Netter again consulted with two other upper level officers and they telephoned the Attorney General's office. (Suber Dep. 40-41.) As the Plaintiffs were being released and were getting their belongings from the front counter, Suber is told that someone from the Attorney General's office said "Lock them up for disorderly conduct, loud voices." (*Id.* 29-30, 41.)

Suber, however, was of the opinion that the disorderly conduct charge did not fit the circumstances because "you can't be disorderly inside of a house" and there was no evidence that the Plaintiffs had become loud or boisterous causing people to wake up, turn on their lights, and/or come outside to investigate a commotion. (*Id.* 42-43.) Although the details of the entire conversation are not in the record, Suber testified he told Netter that the disorderly conduct charge was not "an appropriate charge," but Netter indicated that as watch commander he was going to charge the Plaintiffs. (*Id.* 42-43.) Suber walked out and the Plaintiffs were then gathered and processed for disorderly conduct. (*Id.* 43, 30.)

C. Defendant Officer Andre Parker

At one point in Officer Parker's deposition, he testified that prior to his arrival at the scene a call went out for assistance at the house because "there was some unlawful people inside of this home." (Parker Dep. 10.) At another point he testified

> there was a call. The call that came out was for a loud party at the location. And there had

> been like previous calls to that house that there were some—I mean, I've heard officers have talked about that there was some—a lot of partying going on at this particular location over course of time [sic].

(Parker Dep. 11.) Parker further testified that the person who called the precinct indicated there was illegal activity going on at the house and this information was passed on to the officers. (Parker Dep. 17.) At some point, he was told the "house was due to be vacant. It was a vacant home. And no one had permission to be there." (*Id.* 11.)

Once he entered the house, he observed individuals holding cups and he went upstairs where he observed women dressed "provocatively" with money in their garters. (Parker Dep. 14.) He also smelled marijuana and searched for illegal narcotics, but did not find any illegal narcotics and observed no illegal activity. (Parker Dep. 14-15, 17, 20.) Inside the house Parker observed a mattress, along with lighted candles, but testified he did not see "any furniture." (Parker Dep. 14-15.)

While the officers were investigating the scene, all of the "individuals were asked who the owner of the house was and where the owner was." (Parker Interrog. 2.) One of the Plaintiffs told Parker "that her friend Peaches had allowed her—Peaches was throwing the party," but Peaches was not at the residence. (Parker Dep. 15-16.) Either this same Plaintiff or one of the other Plaintiffs also told Parker that Peaches was renting the house from the grandson of the owner, who had recently passed away, and that the grandson had given permission for the individuals to entertain in the house. (Parker Interrog. 2.)

Parker asked one of the Plaintiffs to get Peaches on the telephone and to ask her to come back to the house to clear things up by bringing "a lease or something." (Parker Dep. 15-16.) Eventually, Parker spoke to Peaches and she told him that she had just left the house and that she would not return because she was afraid of being arrested. (Parker Interrog. 3.) Peaches did indicate that the grandson of the owner had given her permission to occupy the property and that Parker could confirm this. (Parker Interrog. 3.) Parker then spoke to "Hughes,"[7] who told Parker nobody had permission to be in the house. (Parker Dep. 17-18; Parker Interrog. 2.) Hughes indicated he and Peaches were in the process of working out a leasing arrangement, but they never reached an agreement. (Parker Dep. 17-18.)

Upon learning of this information, Sergeant Suber made the decision to arrest Plaintiffs for unlawful entry. (Parker Dep. 18-19.) When asked if he was familiar with the law regarding unlawful entry at the time of the arrests, Parker responded "Yes." (Parker Dep. 31.) He testified the arrests were made because Peaches was reluctant to come back and "[b]ecause one person said they didn't have the right, and one person said they did have the right." (Parker Dep. 19, 31-32.) "It was stated that because it was not clear who the owner of the house was and whether or not permission was given to the individuals to be in the house at the

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[7] Defendants have introduced property records indicating that a Henry Hughes Jr. owned the house until his death in April 2007, about one year prior to the arrests. (Defs.' Ex. E.) Damion Hughes was the personal representative of the decedent at the time of the arrests, and he sold the property about six months after the arrests. *Id.*

time of the occurrence Sergeant Suber ordered that all the individuals be arrested." (Parker Interrog. 2.)

Parker testified that he did not place anyone under arrest or complete any of the paperwork. (Parker Dep. 20.) He did, however, provide the information he obtained from Peaches and Hughes "to the officers that took [the] arrest." (Parker Dep. 20.) In one of his interrogatory responses he indicates he does not know who arrested the Plaintiffs, but in another interrogatory response he recalls that Officers Khan and Newman made arrests. (Parker Interrog. 12, 20.) There were other officers at the scene, but he does not recall all of their names. (Parker Interrog. 5, 12; Parker Dep. 13.)

Parker did not observe anything at the scene that constituted disorderly conduct. (Parker Dep. 32, 34.)

D. Defendant Officer Anthony Campanale

Officer Anthony Campanale and Officer Parker were on patrol the night of the arrests when they received a call from Officer Jarboe who indicated "there were people in a house at 115 Anacostia Avenue, NE." (Defs. Ex. P, Campanale Interrog. 2.) Upon arriving at the house, Officer Jarboe told Campanale and Parker that "the people in the house should not be there. He also told [them] that he had received information from neighbors that this was an ongoing problem. Officer Jarboe further stated that the neighbors had advised him that the house was abandoned and nobody should be in it." (*Id.*) After entering the house, Campanale observed some individuals holding cups of liquor and beer and he could smell marijuana. (*Id.*) He "also observed female [sic] provocatively dressed with dollar bills in a garter belt around their leg." (*Id.*)

Campanale began taking pictures, during which time Sergeant Suber arrived. (Campanale Interrog. 2.) When the occupants were asked who gave them permission to be in the house, plaintiff Natasha Chittams indicated "Peaches" gave them permission. (*Id.*) Later, Campanale was informed by Officer Parker that he spoke to Peaches. (Campanale Dep. 35; Campanale Interrog. 2.) Officer Parker told Campanale that, although Peaches allegedly had permission to use the residence, she could not return to the scene and could not identify the owner. (Campanale Dep. 35; Campanale Interrog. 2.) Further, Campanale observed that none of the other occupants "could say who gave them permission to be in the house." (Campanale Interrog. 2.) Instead, they said they were present at the "invitation of somebody else." (Campanale Interrog. 9.)

In his interrogatory responses, Campanale explains that "individuals were handcuffed and arrested for unlawful entry," but he does not know who did so. (Campanale Interrog. 19-20.) In his deposition, however, he says he arrested someone for unlawful entry because they did not have permission to be inside the residence, but he does not remember who he arrested or whether the individual was male or female. (Campanale Dep. 35, 37.) When asked how he made the unlawful entry determination, Campanale testified that Officer Parker told Campanale and Sergeant Suber about Parker's conversation with Peaches. (Campanale Dep. 35.) Based on that information, "we believed we had probable cause to place the individuals under arrest for unlawful entry. Nobody could determine who was supposed to be inside the residence." (*Id.*) When asked his understanding of what constitutes unlawful entry, he replied "you're present inside of a location that you do

not have permission to be in." (*Id.* 35.) Later, he gave his arrest reports to Officer Phifer because the officers "were at check-off point," and the supervisors were not allowing the officers to "stay past [their] tour." (*Id.* 41.)

Campanale did not observe any conduct that would support a charge of disorderly conduct. (Campanale Dep. 41-42.) According to Campanale, the other four defendants were at the scene along with other officers. (Campanale Interrog. 5.)

E. Defendant Officer Edwin Espinosa

On the night of the arrests, Espinosa was partnered with his training officer, Master Patrol Officer Gregory Phifer, who had a conversation with Officer David Jarboe. (Espinosa Interrog. 2.) Espinosa does not know the substance of the conversation, but he and Phifer left the precinct and drove to the house. (*Id.*) Although the arrest report indicates Espinosa heard "loud music" prior to entering the house, when asked to give a statement of facts surrounding the arrest of Plaintiffs, Espinosa's interrogatory responses make no mention of hearing music, much less loud music. (Espinosa Interrog. 2.) Upon entering the house, he did not observe any illegal activity. (Espinosa Dep. 11.) The Plaintiffs were asked "if there was an owner to the apartment or to that residence," and when that question was not answered, Officers Phifer and Jarboe tried to determine if anyone knew the owner and the Plaintiffs "came up with no answer." (Espinosa Dep. 11-12.) Espinosa does not know who made the decision to arrest the Plaintiffs or who actually arrested them, but he did not question, search, detain or handcuff any of the individuals or tell them they were under arrest. (Espinosa Dep. 12; Espinosa Interrog. 2, 16, 20.)

He and Officer Phifer later returned to the precinct where Espinosa completed three arrest forms "by copying the individuals [sic] information from the MPD form 256." (Espinosa Dep. 12.) He also signed the forms, but he did not complete the narrative and he did not obtain any information from any of the officers prior to handling the paperwork. (Espinosa Interrog. 2; Espinosa Dep. 12, 21.) Phifer gave Espinosa the assignment for completing the forms. (Espinosa Interrog. 19.)

In addition to Officer Phifer, Espinosa recalls seeing Officers Khan and Jarboe at the scene, but he does not recall which other officers were present. (Espinosa Interrog. 4, 12.) He did not observe any activity that would support a charge of disorderly conduct. (Espinosa Dep. 22.)

F. Defendant Officer Faraz Khan

Khan was riding with training Officer Jarboe on the night of the arrests. (Khan Interrog. 2.) Jarboe and Phifer had a conversation about going to the house, but Khan does not recall the particulars of that conversation. (*Id.*) Once at the house, he saw "females dressed only in their bra and thong with money hanging out their garter belts." (*Id.*) Khan stayed in the living room. (*Id.*) At no point did he observe any drugs or illegal conduct. (Khan Dep. 12.)

He does not recall who made the decision to arrest the Plaintiffs, but he did not detain or arrest any of the Plaintiffs. (Khan Interrog. 2, 19.) Later he returned to the precinct and began to "process" the Plaintiffs by completing six or seven arrest forms. (Khan Interrog. 2; Khan Dep. 12.) Although Officer Phifer wrote the narrative, Khan completed the front page and signed the forms, but he does not remember who told him to

sign. (Khan Interrog. 2, 7, 19.) Khan testified that because he was in training, his training officer "gave" him the arrests, but at the time he began completing the paper work he did not know the basis of the arrest charge. (Khan Dep. 12-13, 15.) Later, prior to signing the form, he found out from Jarboe that the Plaintiffs "did not have permission, right to be in that house and they're going to be charged with unlawful entry." (Khan Dep. 15.) Other than the information from Jarboe, Khan did not have any information that would substantiate a charge for unlawful entry and he does not know how the decision was reached. (Khan Dep. 13, 15-17.) Indeed, he did not observe anything that led him to believe that Plaintiffs did not have the right to be there. (Khan Dep. 17.)

In addition to Defendants Campanale, Newman, and Espinosa, Khan recalls seeing other officers on the scene, but he does not know who assisted with the arrests of Plaintiffs. (Khan Interrog. 5, 12.)

He did not observe anything at the scene that would support a disorderly conduct charge. (Khan Dep. 16.)

G. Defendant Officer Jason Newman

When Officer Newman entered the property, he observed officers speaking to individuals on the first floor. (Newman Interrog. 2.) Newman went upstairs and found a male "hiding in a closet, one female may have been in the bathroom and another female was just standing in the bedroom." (*Id.*) These persons went downstairs at the direction of the officers and, at some point, Sergeant Suber arrived and someone explained to him "what was going on." (*Id.*) Newman remembers officers asking who lived in the house, but the individuals were unable to answer the questions,

at which time Suber made the decision to arrest the individuals for unlawful entry. (*Id.*)

In addition to Suber and the other four Defendants, Newman remembers seeing several other officers on the scene, but he does not know if any assisted with the arrest of Plaintiffs. (Newman Interrog. 5, 12.) Sgt. Suber ordered Newman to make an arrest. (Newman Interrog. 19.) Newman believes the person he arrested was Ethelebert Louis. (*See* Newman Dep. 15-16.) Newman testified that Louis

> was an individual I basically attached my name to with an arrest. There were a lot of people being arrested. So at this point you just, "This is your guy you're arresting; Officer this is your guy you're arresting." . . . You just—arrest this person, next person is this officer's. Because there's so many people, one officer can't take all [of the Plaintiffs].

(Newman Dep. 16.) When asked the basis for the arrest, Newman responded "no one knew who the owner was. . . . [Louis] did not know who the owner was." (Newman Dep. 20.) Newman did not observe anything at the scene that would justify a disorderly conduct charge. Indeed, he did not observe any illegal conduct. (Newman Dep. 12, 24.)

H. The Arrest Form

Defendants admit one or more of them are listed as the "Arresting Officer" on each of the Plaintiffs' arrest forms. (Doc. 31, Defs.' Summ. J. Brief 8.) However, the record contains only one of those "Arrest/ Prosecution Report" forms and it lists Cory Bonds as the arresting officer and Newman as an assisting officer. (Defs.' Ex. A.) The name of the arrestee is blacked out on the arrest form filed with the Court. (*Id.*)

The narrative on the second page explains that the police responded to the house to "investigate a complaint of illegal activities which generated from inside of the event location. The information came from a former ANC commissioner, W-1. W-1 also stated, the listed property has been vacant for several months." (*Id.*) Although the form lists "Foster" as complainant/witness 1, there is no statement in the record from "Foster."

"Keck" is listed as complainant/witness 2. The record contains a declaration from Randy Keck, who lives three doors down from the house at issue. (Defs.' Ex. O, Keck Decl. ¶ 1.) Keck declares in his undated statement that he "thought" the house was vacant and that about one month prior to the arrests he began to notice many cars parked outside the residence, as well as along the block. (*Id.* ¶¶ 3-4.) However, he does not indicate what information he provided to the police prior to the arrests about what occurred on the night in question.[8]

The narrative on the form indicates that Officer Phifer and Defendant Espinosa heard loud music coming from inside the house upon arrival, although Espinosa did not mention hearing any music when asked via interrogatory to explain the facts surrounding the arrest of the Plaintiffs. (Defs.' Ex. A; Espinosa

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[8] The record also contains a "Complaint/Witness Statement" from an individual with an unidentified first name and the last name of Waters. (Defs.' Ex. C.) This individual observed "a lot of people going into the house next door," people being searched prior to entering the house, and ladies with overnight bags. (Defs.' Ex. C.) This unsigned and undated statement does not indicate that the house was vacant, that police were informed it was vacant or when the witness shared her observations with the police. (*See id.*)

Interrog. 2.) According to the arrest report, once inside the house, Defendant Parker found marijuana. (*Id.*) However, there is nothing in the record indicating the officers found illegal drugs at the scene. Moreover, Officer Parker testified that, while he smelled marijuana in the air, no drugs were found in the home. (Parker Dep. 14-15.) The report indicates that the home

> was in disarray which is also consistent with it being a vacant property. Further investigation revealed no one could be located as having given permissing [sic] to occupy the listed property.

(Def.'s Ex. A.) Finally, the report lists the charge as unlawful entry in typeface, but that charge is crossed out and disorderly conduct was handwritten onto the form. (*Id.*)

In addition to the non-defendant officers, the arrest report notes the involvement of Defendants Newman, Espinosa, Khan and Parker in the investigation at the scene. (*Id.*)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Moore v. Hartman*, 571 F.3d 62, 66, 387 U.S. App. D.C. 62 (D.C. Cir. 2009) (citing Fed. R. Civ. P. 56(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A genuine issue of material fact exists if the evidence, viewed in the light most favorable to the non-movant, "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. A non-moving

party, however, must provide more than "a scintilla of evidence" in support of its position; the quantum of evidence must be such that a jury could reasonably find for the non-moving party. *Id.* at 252.

Here, both parties have moved for summary judgment. Thus, the Court must analyze the Defendants' motion (including the qualified immunity defenses) while viewing the facts in the light most favorable to the Plaintiffs, and, alternatively, analyze the Plaintiffs' motion while viewing the facts in the light most favorable to the Defendants. *See Johnson v. District of Columbia*, 528 F.3d 969, 973-78, 381 U.S. App. D.C. 351 (D.C. Cir. 2008).

III. PROBABLE CAUSE

In this case, each of the Plaintiffs' three claims is predicated upon the allegation that the Plaintiffs were arrested without probable cause. If the police had probable cause to arrest the Plaintiffs, then all three claims fail. Thus, the Court will review this question first.

When the Plaintiffs were arrested at the Anacostia Road house, the basis for the arrest was their alleged violation of the unlawful entry statute. Sometime after the Plaintiffs were taken to the police station, the basis for the arrest changed to their alleged violation of the disorderly conduct statute. Accordingly, the Court will review each of the two grounds for arrest separately.

A. Unlawful Entry

In the instant case, even when considering the facts in the light most favorable to the Defendants, it is clear that Plaintiffs were arrested for unlawful entry without probable cause. Under District of Columbia law, a Plaintiff violates the unlawful entry statute

when she enters private property "without lawful authority" and "against the will of the lawful occupant or of the person lawfully in charge." D.C. Code § 22-3302 (a)(1). It is well settled that "[t]o be against the will of the lawful occupant the entry must be against the expressed will, that is, after warning to keep off." *Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965); *see also Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993) ("When a person enters a place with a good purpose and a bona fide belief in his or her right to enter, that person lacks the requisite criminal intent for unlawful entry. . . ."); Barbara E. Bergman, *Criminal Jury Instructions for the District of Columbia* § 5.401 (Matthew Bender, Rev. Ed.) (unlawful entry requires proof that the accused "knew or should have known that s/he was entering against the person's will").

In the instant case, the evidence is undisputed that the Plaintiffs were expressly or impliedly invited onto the property by a woman named "Peaches" and that several of the police officers were aware of this invitation. Most importantly, it is undisputed that Sergeant Suber made the decision and gave the order to arrest the Plaintiffs for unlawful entry and that he did so even though he was aware that the Plaintiffs were on the property at the invitation of Peaches. While it turns out that Peaches may not have had the authority to invite guests to the house, nothing about what the police learned at the scene suggests that the Plaintiffs "knew or should have known that [they were] entering against the [owner's] will." *See* Criminal Jury Instructions § 5.401.

Even though there is evidence that one or more neighbors told the officers that the property was supposed to be vacant, this is not a case where the

property was boarded up, door latches were broken, no trespassing signs were posted or the manner of securing the property indicated that the owner wanted others to keep out. *See* D.C. Code § 22-3302 (a)(1).[9] Indeed, although the house was in disarray, it is undisputed that the electricity was working, the property contained a mattress, candles, chairs, food, and the bathrooms were functional. (Suber Dep. 11; Parker Dep. 14-15; Louis Dep. 28; Chittams Dep. 27-28, 30-33.) Thus, the neighbors' statements, that the property was "supposed to be" vacant, were insufficient under the circumstances to establish probable cause to believe that the Plaintiffs had been told not to enter by the owner or that the Plaintiffs knew or should have known that they had entered the property against the owner's will. *Compare Jones v. United States*, 282 A.2d 561, 562-63 (D.C. 1971) (defendant lawfully arrested inside vacant apartment building where police discovered broken latch and an opened door with a damaged door panel upon arrival); *Culp v. United States*, 486 A.2d 1174, 1175-77 (D.C. 1985) (officers had probable cause to believe intruders had entered against the express will of the owner where at least some windows on the property were boarded up, the property owner had diligently attempted to keep the windows boarded and the intruder had no

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[9] "The presence of a person in any private dwelling, building, or other property *that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign*, shall be prima facie evidence that any person found in such property has entered against the will of the person in legal possession of the property." D.C. Code § 22-3302 (a)(1) (2007) (emphasis added). Thus, mere presence in a supposedly vacant building, if the building is not boarded up or displaying a "no trespassing" sign, is not prima facie evidence that the entry into the building was against the will of the owner.

explanation for his presence on the property); *Best v. United States*, 237 A.2d 825 (D.C. 1968) (officer had probable cause where intruder could not provide a logical explanation for his presence in building and the building manager told the officers at the scene that the building was generally kept locked and the public was not invited to enter).

Finally, while Officer Parker's conversation with "Hughes" may have provided evidence that the Plaintiffs did not have permission to remain on the property, the conversation did not provide evidence that Plaintiffs had been warned to stay off of the property or should have known they were not welcome at the time of their entry onto the property. Such evidence is essential to establish probable cause for unlawful entry. *See District of Columbia v. Murphy*, 631 A.2d 34, 38 (D.C. 1993) (finding no evidence of probable cause to arrest for unlawful entry where it was undisputed that the apartment owner told the responding officers she wanted her boyfriend to leave, but she never told the officers that she "actually had *asked* [the boyfriend] to leave [prior to the officers' arrival] and that he had refused.") (emphasis in original), *aff'd on rehearing*, 635 A.2d 929 (1993).

Accordingly, the officers did not have probable cause to support the unlawful entry arrest. Indeed, Suber and three of the defendants erroneously believed that proof of intent to enter the property against the owner's will was unnecessary, contrary to the long-established precedent described above. (*See* Suber Dep. 39; Parker Dep. 19, 31-32; Parker Interrog. 2; Campanale Dep. 35; Newman Dep. 20.)

B. Disorderly Conduct

Similarly, even considering the evidence in the light most favorable to the District, the Court finds that the arrests for disorderly conduct were made without probable cause.

Indeed, the District made no serious attempt in its pleadings to explain how the determination was made that probable cause existed for the offense of disorderly conduct, effectively conceding the issue.[10] The testimony placed into the record by every single police officer who was present on the scene indicated that they did not witness any conduct that justified the disorderly conduct arrests. (Pls' Statement of Undisputed Facts ¶ 1; Defs.' Resp. to Pls.' Statement of Undisp. Facts ¶ 1.) The Defendants have not presented any evidence from Lt. Netter, who ordered the arrests, or from the unidentified representative from the Office of the Attorney General, who advised Netter that the arrests were proper. Despite six rounds of briefings on the two motions for summary judgment, the Defendants have made no substantive effort to set forth what specific facts were relied upon by Netter or the Attorney General's representative and how any such facts established probable cause to arrest each of the Plaintiffs for disorderly conduct.

The only evidence presented about how or why the decision was made to arrest the Plaintiffs for disorderly conduct came from Sgt. Suber, who testified that Lt. Netter said he was told by the OAG representative that he could arrest the Plaintiffs for disorderly conduct based on "loud voices." (Suber Dep.

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[10] As described below, the District instead relied upon absolute immunity and other arguments to defend against liability for the disorderly conduct arrests.

29-30, 41.) While there was evidence in the record that the police were told of reports of a loud party or loud music and some officers heard loud music upon arrival, there was no evidence that the police were told of "loud voices" or of noise that was so unreasonably loud or sustained for such a lengthy period of time as to justify the arrests for disorderly conduct based on then-existing D.C. Code § 22-1321(3).[11] *See In re T.L.*, 996 A.2d 805, 814 (D.C. 2010) (to find a violation under § 22-1321(3), prohibiting a "breach of the peace" by "shout[ing] or mak[ing] a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons," the court "stress[es] the government's burden of showing that the noise was *unreasonably* loud under the circumstances") (emphasis in original). While their testimony indicates that some of the officers operated under the erroneous belief that "a person cannot be disorderly inside a house," none of them testified that they observed "unreasonably loud," sustained noise that "disturbed a considerable number of persons" when they arrived on the scene.

Furthermore, following a request by the Court for copies of the disorderly conduct charging documents, the record was supplemented with copies of the judicial summonses filed against Plaintiffs Taylor, Chittams, Richardson, Davis, and Louis. (Doc. 37.) Based on those summonses, it appears that Defendants did not even rely upon then existing D.C. Code § 22-1321(3) to make the arrests. Rather, each summons cited D.C. Code § 22-1321(1) as the basis for the disorderly conduct charge. (*Id.*) Pursuant to the then-existing version of D.C. Code § 22-1321(1), which

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[11] Effective 2011, the disorderly conduct statute was significantly amended.

prohibited a "breach of peace" by "act[ing] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others," an arrest would have required evidence that each of the Plaintiffs used words likely to produce violence. *See Shepherd v. District of Columbia*, 929 A.2d 417, 418-19 (D.C. 2007). Defendants have offered no such evidence here.

Additionally, whether viewed pursuant to § 22-1321(1) or § 22-1321(3), Defendants have made no attempt to proffer evidence that probable cause existed that would justify the arrest of each individual Plaintiff for disorderly conduct, as required by the Fourth Amendment. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause . . . . [A] search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another . . . .") (citations omitted); *Barham v. Ramsey*, 434 F.3d 565, 573, 369 U.S. App. D.C. 146 (D.C. Cir. 2006) ("Even assuming that Newsham had probable cause to believe that some people present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining everyone who happened to be in the park. It is firmly established that, to comport with the *Fourth Amendment*, a warrantless search or seizure must be predicated on particularized probable cause.") (citing *Ybarra*, 444 U.S. at 91).[12]

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[12] Moreover, there is no evidence or credible suggestion in this case that the police were confronted by a riotous mob or any other exigency that could justify these arrests based on less than

Thus, the Court finds that the undisputed facts compel a finding that Plaintiffs were arrested without probable cause for unlawful entry and disorderly conduct. We now turn to an analysis of each of the three causes of action, and the defenses applicable to each.

IV. SECTION 1983—FOURTH AMENDMENT CLAIMS

To establish a claim against the police officers under 42 U.S.C. § 1983, Plaintiffs must demonstrate that the officers, while acting under color of state law, deprived the Plaintiffs of "rights, privileges, or immunities secured by the Constitutions and laws" of the United States. 42 U.S.C. § 1983. The complaint alleges that the police officers violated Plaintiffs' Fourth Amendment rights by arresting them without probable cause to believe that they had committed a crime. As shown above, the Plaintiffs have proven that they were arrested without probable cause. Thus, the Plaintiffs

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particularized probable cause. Compare Washington *Mobilization Committee v. Cullinane*, 566 F.2d 107, 116, 120, 184 U.S. App. D.C. 215 (D.C. Cir. 1977) (where Plaintiffs' who were arrested for disorderly conduct challenged their mass arrests because some demonstrators were not guilty of violence and some Plaintiffs were not demonstrators, the Court explained that "the police cannot be expected to single out individuals; they may deal with the crowd as a unit" when "confronted with a mob"); *Carr v. District of Columbia*, 587 F.3d 401, 408, 388 U.S. App. D.C. 332 (D.C. Cir. 2009) (rejecting the lower court's finding that the police lacked particularized probable cause to arrest all of the protestors, the appellate court reasoned that "A requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot, particularly when it is on the move-at night.").

have proven the basic elements of their Section 1983 claim.

In response to Plaintiffs' Section 1983 claim against the officers in their individual capacities, the Defendant officers assert a qualified immunity defense. "Although government officials may be sued in their individual capacities for damages under § 1983 . . ., qualified immunity protects officials from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672, 689, 386 U.S. App. D.C. 144 (D.C. Cir. 2009) (internal citation marks omitted) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). While the question is not entirely free from doubt, it appears that the burden of proving qualified immunity rests with the Defendants. *See Reuber v. United States*, 750 F.2d 1039, 1058 n.25, 242 U.S. App. D.C. 370 (D.C. Cir. 1984). Thus, as to the defense motion for summary judgment, the Court must first determine whether the facts, construed in the light most favorable to the injured parties, show that the officers violated a constitutional right, and second, whether that constitutional right was clearly established at the time of the incident. *See Barham v. Salazar*, 556 F.3d 844, 847, 384 U.S. App. D.C. 401 (D.C. Cir. 2009). If the answer to either of these questions is no, then the defense motion for summary judgment must be granted because the officers are entitled to qualified immunity.[13]

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[13] This Court may exercise its discretion to decline determining whether the officers violated a constitutional right if it appears doubtful that any such right, even if it existed, was clearly established at the time of the incident. *See, e.g. Jones v. Horne*,

As to answering the second question, our Circuit Court has recently explained:

> In a suit alleging arrest or prosecution in violation of the Fourth Amendment, a defendant who mistakenly concludes that probable cause is present is nonetheless entitled to qualified immunity if a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the arresting officers possessed. Such a reasonable if mistaken belief that probable cause exists is sometimes termed "arguable probable cause."

Moore v. Hartman, 644 F.3d 415, 422, 396 U.S. App. D.C. 28 (D.C. Cir. 2011) (citations and some quotation marks omitted); *see also* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of* Section 1983 § 8.24 (4th ed.). When considering Plaintiffs' motion for summary judgment, the Court will review the evidence in the light most favorable to the Defendants.

A. Unlawful Entry Arrests & Defendants' Qualified Immunity Defense

With these principles in mind, the Court turns to the Section 1983 claim based on the arrest of the Plaintiffs for unlawful entry. Subsequently, the Court will consider the Section 1983 claim based on the arrest of the Plaintiffs for disorderly conduct.

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634 F.3d 588, 597, 394 U.S. App. D.C. 261 (D.C. Cir. 2001) (citing *Pearson v. Callahan*, 555 U.S. 223, 236-37, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)). Here, the Court deems it appropriate to address both questions.

1. Plaintiffs' Constitutional Rights Were Violated

As stated above, the Court finds that the Plaintiffs were arrested for unlawful entry without probable cause, which violated their rights under the Fourth Amendment.

2. The Constitutional Rights At Issue Were Clearly Established

Having established that Plaintiffs' constitutional rights were violated, this Court "must determine 'whether the right was clearly established' at the time of the alleged violation." *Bame v. Dillard*, 637 F.3d 380, 384, 394 U.S. App. D.C. 446 (D.C. Cir. 2011) (citations omitted). When determining whether a given constitutional right was "clearly established" for the purposes of establishing qualified immunity,

> "we look to cases from the Supreme Court and [the United States Court of Appeals for the District of Columbia], as well as to cases from other courts exhibiting a consensus view," *Johnson v. District of Columbia*, 528 F.3d 969, 976, 381 U.S. App. D.C. 351 (D.C. Cir. 2008)—if there is one. The facts of such cases need not be "materially similar . . . but have only to show that the state of the law at the time of the incident gave the officer fair warning that his alleged misconduct . . . was unconstitutional." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L.Ed.2d 666 (2002)).

Bame, 637 F.3d at 384 (internal quotation marks omitted); *see Pearson v. Callahan*, 555 U.S. 223, 243-44, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing to

state and federal court cases when discussing clearly established law).

Applying these principles to the present facts, there is no question that the law was clearly established at the time of the arrests. For many decades preceding these arrests, District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent. *Bowman*, 212 A.2d at 611; *Jones*, 282 A.2d at 562-63; Culp, 486 A.2d at 1175-77; *Artisst v. United States*, 554 A.2d 327, 329-30 (D.C. 1989). This is not a case where the parameters of the unlawful entry statute were so muddled that the officers were unable to "'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *See Butera v. District of Columbia*, 235 F.3d 637, 652, 344 U.S. App. D.C. 265 (D.C. Cir. 2001) (citing *Anderson v. Creighton*, 483 U.S. 635, 646, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

The Defendants posit several theories about why the law was not really clearly established in these circumstances. None of them have merit.

First, Defendants argue no clearly established law actually protected these Plaintiffs on that evening. Under the "community caretaker" and/or "exigent circumstances" exceptions to the warrant requirement, the Defendants contend they had authority to enter the property where Plaintiffs, as social guests, had no reasonable expectation of privacy. This argument is irrelevant because Plaintiffs do not challenge the lawfulness of the officers' warrantless entry onto the property or the initial detention of

Plaintiffs during the on-scene investigation. (*See* Doc. 33, Pls.' Summ. J. Resp. 12.)

Defendants boldly proceed to argue that social guests do not have the right to challenge Constitutional violations relating to seizures of their persons. (Doc. 36, Defs.' Reply Br. 2.) However, Defendants are unable to direct the Court to any legal authority that social guests lack Constitutional protection from unreasonable seizures of their *persons*, as opposed to a reduced expectation of privacy with respect to searches or seizures of their *property*. Thus, notwithstanding any purported diminished expectation of privacy as social guests, Plaintiffs most certainly retained their expectation that probable cause was necessary to effectuate each of their arrests; Defendants' argument misses the mark.[14]

Defendants also suggest that their mistaken understanding of the law of unlawful entry supports their claim of qualified immunity. However, "[i]f the law was clearly established, the [qualified] immunity

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[14] Although the Court will not address them all in this opinion, the Defendants have made a number of other near-frivolous and marginally relevant arguments in their briefs, For instance, the Defendants argue that the Plaintiffs could be arrested on a showing less than probable cause because they were social guests on the property and because the police officers were undertaking a "community caretaker" function, even though they have cited no authority, and this Court knows of none, that permits a traditional arrest on less than probable cause in such circumstances. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) ("we confirm today what our prior cases have intimated: the standard of probable cause applies to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.") (some internal quotation marks omitted) (quoting *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)).

defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. A police officer cannot escape liability "if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute." *Butz v. Economou*, 438 U.S. 478, 493-94, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). Thus, "obvious" or "manifestly erroneous" mistakes of law cannot serve as the basis of a qualified immunity claim. Nonetheless, the officers can still prevail if they claim "extraordinary circumstances and can prove that [they] neither knew nor should have known of the relevant legal standard. But . . . the defense would turn primarily on objective factors." *Harlow*, 457 U.S. at 819; accord, *Hobson v. Wilson*, 737 F.2d 1, 25, 237 U.S. App. D.C. 219 (D.C. Cir. 1984).

Here, the Defendants have not cited to any extraordinary circumstances which might have justified their failure to know the relevant law, and the Court is aware of no such circumstances. The unlawful entry statute is not a complicated one, and it is a law that is fundamental to policing because it must be applied daily in various commercial and residential contexts. All police officers, whether veteran or trainee, should be expected to know what it means. Accordingly, Defendants' mistake about the law was not immunized, and the Court finds that no genuine issues of disputed fact exist with respect to whether the officers violated Plaintiffs' clearly established constitutional rights.[15]

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[15] Defendants also contend they are protected by qualified immunity because "officers of reasonable competence" could disagree about whether there was probable cause to arrest the Plaintiffs. (Doc. 30, Defs.' Response to Pls' Summ. J Mot. 5); *see*

3. Defendants' Additional Qualified Immunity Arguments

The Defendants make two further arguments in support of summary judgment based on qualified immunity: reliance on the probable cause determination of fellow police officers (aka collective knowledge) and acting at the direction of supervisors.

(a) The Collective Knowledge Doctrine and/or Fellow Officer Rule

The Defendants argue that they are entitled to qualified immunity because they collectively had sufficient information to support the arrests. (*See* Doc. 31, Defs.' Summ. J. Brief 24-27.) As this Circuit has recognized, "probable cause may emanate from the collective knowledge of the police, though the officer who performs the act of arresting or searching may be far less informed." *United States v. Hawkins*, 595 F.2d 751, 752 n.2, 193 U.S. App. D.C. 366 (D.C. Cir. 1978); accord *Smith v. United States*, 358 F.2d 833, 835, 123 U.S. App. D.C. 202 (D.C. Cir. 1966). In the present case, however, even considering all of the knowledge collectively held by all of the police officers, there was not sufficient information to establish probable cause.

Alternatively, the individual officers submit that pursuant to the "fellow officer rule," they are entitled to qualified immunity even in the absence of collective

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Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (noting that immunity should be recognized if officers of "reasonable competence" could disagree). However, officers of "reasonable competence" are expected to know the law. *Harlow*, 457 U.S. at 818-19. Because these officers erroneously believed that the question of whether Plaintiffs had been invited onto the property was irrelevant, there was no disagreement between "reasonably competent" officers.

knowledge of probable cause because it was objectively reasonable for each of them to rely upon the probable cause determination of one or more of their fellow officers. *See Barham v. Ramsey*, 434 F.3d 565, 577, 369 U.S. App. D.C. 146 (D.C. Cir. 2006); *Bolger v. District of Columbia*, 608 F. Supp.2d 10, 24 (2009) (citing *Barham*, 556 F.3d at 850); cf., Wayne R. LaFave, *Search & Seizure: A Treatise on the 4th Amendment* § 3.5 n.16 (4th ed.) (where police officer conveys some facts that indicate probable cause to a fellow officer, but non-conveyed facts would have defeated probable cause, the officer relying upon the conveyed facts may be immune from tort liability) (citing *Row v. Holt*, 864 N.E.2d 1011 (Ind. 2007)).

In the case at bar, the Court finds that Defendants Parker and Campanale have failed to show, by undisputed facts, that it was objectively reasonable for these officers to rely on the information communicated by others at the scene to support the arrests. While Parker was aware from other officers that the house was supposedly abandoned and there were people inside who should not be there, he knew first-hand that Peaches had given the Plaintiffs permission to enter the house. (Parker Dep. 15-18; Parker Interrog. 2,3.) Although he was informed by the purported owner that Plaintiffs did not have permission to occupy the property, Parker had no evidence that the owner had warned Plaintiffs not to enter or that Plaintiffs should have known entry was forbidden. (Parker Dep. 17-18; Parker Interrog. 2.)

Campanale was also aware from other officers that the house was supposedly abandoned and that there were people inside who should not be there, but he also knew that Peaches had given the Plaintiffs permission to entertain at the house. (Campanale Dep. 35;

Campanale Interrog. 2.) He also knew first-hand that some of the Plaintiffs were present at the "invitation" of someone else. (Campanale Interrog. 9.)

Thus, even considering the evidence in the light most favorable to the Defendants, the Court finds that Parker and Campanale are not entitled to qualified immunity on the Section 1983 claims arising out the unlawful entry arrests and, furthermore, that Plaintiffs are entitled to summary judgment with respect to these two officers.

As to Defendants Espinosa, Newman and Khan, it is less clear from this record whether they each specifically knew that the Plaintiffs had been invited onto the property. While these three officers did not make such admissions in the sworn documents found in the record, the Defendants' own Statement of Undisputed Facts admits that "MPD Officers were told by some social guests at 115 Anacostia Road, N.E. that a woman named 'Tasty' or 'Peaches' owned or rented 115 Anacostia Road, N.E., and that she had given permission to hold a bachelor party on site that night." (SOF ¶ 27.) Given this admission, these remaining three Defendants are not entitled to summary judgment on the theory that they were solely relying upon the judgment of their fellow officers and did not know themselves that probable cause was lacking due to the fact that Peaches had invited Plaintiffs onto the property. Likewise, the Plaintiffs are not entitled to summary judgment, given the dispute in the evidence. Therefore, the jury will have to decide whether Espinosa, Newman and Khan were aware of the invitation, and that factual finding will dictate whether those Defendants are entitled to qualified immunity based on the fellow officer defense.

(b) Acting at the Direction of Supervisory Officers

Similar to their contention based upon the fellow officer rule, Defendants assert that they are protected by qualified immunity because they were ordered by superior officers to arrest Plaintiffs.

However, our Circuit has specifically rejected the argument that immunity automatically attaches were public officials violate a citizen's rights at the direction of higher authority. In *Hobson v. Wilson*, 737 F.2d 1, 237 U.S. App. D.C. 219 (D.C. Cir. 1984), FBI agents argued that they were protected by qualified immunity because they had acted in compliance with the agency's approved policy when they conducted counter-intelligence operations in violation of plaintiffs' First Amendment rights. Rejecting this argument, the Court reasoned "[i]n its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights. We have no hesitation in rejecting this new argument." *Id. at 67*. Our Circuit is not alone. *See, e.g. Kennedy v. City Of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) ("[S]ince World War II, the just following orders defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order.") (citing *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (internal quotation marks omitted)); *Brent v. Ashley*, 247 F.3d 1294, 1305 (11th Cir. 2001) ("following orders does not immunize government agents from civil rights liability); *Leonard v. Compton*, No. 1:03CV1838, 2005 WL 1460165, at *6 (N.D. Ohio June 17, 2005) ("Just as an official policy

does 'not make reasonable a belief that was contrary to a decided body of case law,' . . . police officers cannot obtain a license to violate clearly established constitutional rights from their superior officers.") (citing *Wilson v. Layne*, 526 U.S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)).

Some courts, however, have permitted a "just following orders" defense in limited, specific, circumstances. "While it is typically no defense for an officer to claim he was simply 'following orders,' plausible instructions from a superior or fellow officer can support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists." *Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 199 (3d Cir. 2005) (citing *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir. 2000)).

In the present case, however, the only way that the superior officer's order to arrest the Plaintiffs could have been "plausible" and could have given the subordinate officer a reasonable basis to conclude that legal justification existed to arrest Plaintiffs for unlawful entry would have been if the subordinate officer was not aware of the invitation for Plaintiffs to enter the property. Consequently, the Court finds that any of the Defendants, including the two trainees (Espinosa and Khan), who were aware of the Plaintiffs' invitation to enter the property failed to act reasonably given the circumstances, despite Sgt. Suber's orders. *See Leonard*, 2005 WL 1460165, at *6 (finding both training officer and rookie officer could not "avoid liability by simply arguing" they were "following orders."). Accordingly, in this case, the final analysis of qualified immunity based upon the

"following orders" argument is identical to that under the "fellow officer" rule. The argument does not prevent liability for Defendants Parker and Campanale, but Defendants Espinosa, Newman and Khan could prevail depending upon the jury's factual finding at trial.

4. Defendants' Claim That They Did Not Personally Arrest Plaintiffs for Unlawful Entry Is Unavailing

Although Defendants admit their names appeared on Plaintiffs' arrests reports, (Doc. 31, Defs.' Summ. J. Br. 8), Defendants claim there is no evidence they personally arrested the Plaintiffs and, therefore, they are not liable for the Section 1983 claim. The Court is unpersuaded by this argument. As an initial matter, two of the officers (Campanale and Newman) admit that they each arrested one of the Plaintiffs. (Campanale Dep. 35, 37; Newman Dep. 15-16.)

With respect to the three remaining officers, Khan, Espinosa and Parker, they cannot avoid liability simply by pointing a finger at the other officers on the scene. "One who directs or assists an unlawful arrest may be liable." *Gordon v. Degelmann*, 29 F.3d 295, 298 (7th Cir. 1994) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 200, 26 L. Ed. 377 (1880)). As explained by the Seventh Circuit:

> Federal common law principles of tort and damages govern recovery under section 1983. It is axiomatic that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury. *Restatement (Second) of Torts*, §§ 875, 879. In such a case the injured party

> may proceed to judgment against any or all of the responsible actors in a single or in several different actions. *See Restatement (Second) of Torts*, § 882.

Watts v. Laurent, 774 F.2d 168, 179 (7th Cir. 1985) (citations to cases omitted); *see also Burns v. Reed*, 500 U.S. 478, 484, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (Section 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.") (citations and internal quotation marks omitted); Michael Avery, David Rudovsky & Karen M. Blum, *Police Misconduct Law and Litigation* § 12.36 (3d ed.) (explaining joint and several liability in the context of Section 1983 claims).

The Court finds that Officers Khan, Espinosa and Parker are subject to liability as joint tortfeasors. It is undisputed that all three officers were present on the scene, all three were present in the house during at least some portion of the investigation, and all three were actively involved in the matter at some juncture. Parker admittedly spoke with Peaches and Hughes, as well as one or more Plaintiffs who told the officers that Peaches had given Plaintiffs permission to occupy the property. (Parker Dep. 15-18: Parker Interrog. 2, 3.) Parker also provided Sgt. Suber with the results of the investigation, observed officers making arrests, and provided investigative information to the officers who "took" the arrests. (Parker Dep. 20.) Khan admitted signing and completing a portion of six or seven arrest forms, while Espinosa admitted signing and completing a portion of three forms. (Khan Dep. 12; Khan Interrog. 2, 7, 9; Espinosa Interrog. 2; Espinosa Dep. 12, 21.)[16] Thus, the officers' own testimony establishes

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[16] The Court notes that although Khan claims he did not physically arrest any of the Plaintiffs, (Khan Interrog. 2, 19),

that they "actively participate[ed] in a wrongful act, by cooperation or request, or . . . lend[ed] aid" to the arresting officers. *See* Police Misconduct § 12.36; *see also James by James v. Sadler*, 909 F.2d 834 837 (5th Cir. 1990) (reversing summary judgment for local police officers who provided back-up during illegal search by narcotics agents because role of the local officers was "integral to the search"). As such, Khan, Espinosa and Parker are jointly and severally liable with whomever actually placed the Plaintiffs in handcuffs and transported them to the police station.

Defendant's reliance on *Fernandors v. District of Columbia*, 382 F. Supp.2d 63 (D.D.C. 2005) is misplaced. In *Fernandors*, the District of Columbia conceded that the two officers who first arrived on the scene and apprehended the plaintiff were not entitled to qualified immunity because of disputed factual issues. *Id.* at 71. The Court held that a third officer was entitled to qualified immunity on a false arrest claim because he arrived at the scene after the apprehending officers and it was undisputed that he did not make the determination to arrest the plaintiff. *Id.* at 71-74. Indeed, he possessed no information about the circumstances that supported the arrest. *See id.* at 72-73.

In contrast, Khan, Espinosa and Parker saw the events unfold and observed the results of the investigation on the scene. As such, either they had first-hand knowledge that probable cause did not exist to arrest Plaintiffs or they had enough information to question whether probable cause existed. Thus, the

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Parker testified that he saw Khan make an arrest. (Parker Interrog. 12, 20.)

facts of the present case are vastly different from the facts in *Fernandors*.

Rather, the instant case is more like *Dubner v. City and County of San Francisco*, 266 F.3d 959 (9th Cir. 2001). In *Dubner*, one of the officers on the scene signed the plaintiff's arrest form and admitted making arrests during a mass protest, but could not remember whether she had arrested the plaintiff. *Id.* at 964. At the end of trial, the court dismissed plaintiff's unlawful arrest claim because she had no evidence that the officer who signed the arrest form had actually made the arrest. *Id.* at 964-65. The Ninth Circuit Court of Appeals reversed, explaining that while plaintiff bore the burden of proving the unlawful arrest, the burden of production then shifted to the defendant to provide evidence that the arresting officers had probable cause. *Id.* at 965 "This minimal burden shifting forces the police department, which is in the better position to gather information about the arrest, to come forward with some evidence of probable cause." *Id.* The Court reasoned that shifting the burden of production to the defendants, prevented "this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire." *Id.* The Ninth Circuit's application of this burden shifting approach in Section 1983 false arrest cases is consistent with the law of the United States Court of Appeals for the District of Columbia. *See Dellums v. Powell*, 566 F.2d 167, 175, 184 U.S. App. D.C. 275 (D.C. Cir. 1977) (explaining that once a plaintiff establishes that she was arrested "without process," the "burden then shifts to the defendant to justify the arrest.")

Finally, given the unique circumstances presented in the instant case, it would not be in the interest of justice to grant summary judgment to police officers who signed the arrest forms but are now unwilling to take responsibility for the arrests. *See Rauen v. City of Miami*, No. 06-21182-CIV, 2007 U.S. Dist. LEXIS 14931, 2007 WL 686609, at *4-5 (S.D. Fla. March 2, 2007) (denying motion to dismiss where plaintiffs could not identify individual officers involved in arrest of protestors because the officers at the scene wore identical riot gear, their faces were covered by shields and their uniforms had no identifying information). Accordingly, Defendants' assertion that they did not arrest Plaintiffs does not justify dismissal of Plaintiffs' claims.

B. Disorderly Conduct Arrests & Defendants' Absolute and Qualified Immunity Defenses

As noted above, the Section 1983 unlawful arrest claim has been brought against five police officers, Edwin Espinosa, Jason Newman, Anthony Campanale, Andre Parker and Faraz Khan. This claim was not brought against the City, Lieutenant Netter (who ordered the arrests), or the representatives within the office of the Attorney General who advised Netter to order the arrests. The five police officer Defendants contend they are entitled to summary judgment on the Section 1983 claim based upon the disorderly conduct arrests because the Attorney General's office made the decision to "charge" the Plaintiffs and, because charging is a discretionary function of the executive branch, the arrests are therefore protected by absolute immunity. This argument is without merit.

The Supreme Court held over twenty years ago that a prosecutor does not enjoy absolute immunity from a Section 1983 action challenging her erroneous advice

to the police that there was probable cause to arrest the plaintiff, because "the prosecutorial function of giving legal advice to the police" is not the type of adversarial prosecutorial activity that merits absolute immunity protection. *Burns v. Reed*, 500 U.S. 478, 496, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). Thus, the fact that in the instant case a prosecutor advised the police that there was probable cause to arrest the Plaintiffs for disorderly conduct does not clothe the police officers with absolute immunity because they relied upon such advice. *See id.*; *see also Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672, 683, 386 U.S. App. D.C. 144 (D.C. Cir. 2009) (citing *Burns*, 500 U.S. at 492-96).[17] Accordingly, reliance by police officers upon the advice of a representative from the Attorney General does not provide absolute immunity, but it does factor into the qualified immunity analysis, along with all of the other facts and circumstances. *Id.*; *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 254-55 (3d Cir. 2010) (applying qualified immunity standard and rejecting argument that seeking advice of prosecutor makes action by police officer per se objectively reasonable) (citing *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004)).

Apparently because the Defendants placed complete reliance on their absolute immunity argument, they

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[17] The cases cited by Defendants in support of the proposition that absolute immunity protects prosecutorial "charging decisions" are inapposite, because the plaintiffs here are challenging their arrests, rather than their charges, and charging is the act of lodging of a criminal complaint. *See Marrow v. United States*, 592 A.2d 1042, 1046 (D.C. 1991) ("an individual is 'charged' . . . when a criminal complaint . . . and warrant . . . are signed by a judge and filed . . ."); accord *Burns*, 500 U.S. at 494 ("absolute prosecutorial immunity [is justified] only for actions that are connected with the prosecutor's role in judicial proceedings").

have failed to argue or brief how they are entitled to qualified immunity for the Section 1983 claim based on the unlawful disorderly conduct arrests. Thus, the Defendants, despite six rounds of briefings on the two motions for summary judgment, have made no effort to set forth what specific facts were relied upon by the police officers or the Attorney General's representative in deciding to arrest the Plaintiffs for disorderly conduct, how any such facts established probable cause to arrest the Plaintiffs for disorderly conduct, or why the Defendants' actions were objectively reasonable. Therefore, even if the Court were to construe the Defendants' motion for summary judgment as including a qualified immunity argument as to this claim, the Court is without any basis to grant judgment for Defendants. Accordingly, the defense motion for summary judgment on the Section 1983 disorderly conduct arrests is denied.[18]

Indeed, the Court finds that Plaintiffs' motion for summary judgment is due be to granted, in part, because qualified immunity does not apply to any officers who participated in the disorderly conduct arrests. The advice of the prosecutor's office does not make these arrests objectively reasonable and there is no evidence in the record that Netter or the OAG representative attempted to ascertain any specific information about the level, type, or duration of noise at the house or who was responsible for creating the "loud voices" before ordering the mass arrest of every

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[18] The Defendants assert that none of them participated in the disorderly conduct arrests. However, each of the collateral/bond receipts submitted for the record list one of the five Defendant officers as the arresting officers on the disorderly conduct charges, thereby precluding summary judgment against the Plaintiffs on this ground. (*See* Doc. 38 at 5-9.)

single person who happened to be in the house when the police arrived.

Furthermore, Defendants have made no attempt to proffer evidence that probable cause existed as to each Plaintiff, as required by the Fourth Amendment. *See Barham*, 434 F.3d at 573 ("No reasonable officer in Newsham's position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park. Even assuming that Newsham had probable cause to believe that some people present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining everyone who happened to be in the park."). It will be up to the jury to determine which Defendant officers, if any, are liable for having participated in the disorderly conduct arrests.

V. STATE LAW FALSE ARREST CLAIMS

The District of Columbia is liable, as *respondeat superior*, for the tort of false arrest, if an MPD officer commits the tort of false arrest while acting within the scope of his employment. *See generally Wade v. District of Columbia*, 310 A.2d 857, 863 (D.C. 1973) (en banc); *see also Dellums v. Powell*, 566 F.2d 216, 223, 184 U.S. App. D.C. 324 (D.C. Cir. 1977) (citing *Wade*, 310 A.2d at 857). As discussed above, the Court finds that each of the Plaintiffs was arrested without probable cause. However, because the liability of the City is derivative of the liability of the police officer, any individual defenses available to the police officer will also preclude judgment against the City.[19] *See*

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[19] In their brief, the Plaintiffs clarify that they are asserting Count II against the District of Columbia, as well as against the officers in both their official and individual capacities. (Doc. 33, Pls.' Summ. J. Response 4.)

Minch v. District of Columbia, 952 A.2d 929, 938 (D.C. 2008).

"Under District of Columbia law, a police officer may justify an arrest by demonstrating that "(1) he or she believed, in good faith, that his or her conduct was lawful, and (2) this belief was reasonable." *Scott v. District of Columbia*, 101 F.3d 748, 754-55, 322 U.S. App. D.C. 75 (D.C. Cir. 1996) (citing *District of Columbia v. Murphy*, 631 A.2d 34, 36 (citations and internal quotation marks omitted), *on reh'g*, 635 A.2d 929 (D.C. 1993)); *see* Stevens, Ed., *Standardized Civil Jury Instructions for the District of Columbia* § 18.03 (2011 Rev. Edition). Thus, even if an arrest is unlawful, a defendant may avoid liability if he can show that he had a subjective good faith belief that his conduct was justified and that subjective belief was reasonable. *See Scott*, 101 F.3d at 753-55 (reversing jury verdict against two arresting officers who had a reasonable, good faith belief that Plaintiff was properly in their custody and who could not have known from their observations that the arrest was not authorized under District of Columbia law) (citing *Murphy*, 631 A.2d at 36); *Liser v. Smith*, 254 F. Supp. 2d 89, 96-100 (D.D.C. 2003) (granting summary judgment for defendant officers where officers arrested plaintiff based on an ATM video recording time-stamp because the AUSA had made the final probable cause determination and the officers had a good faith reasonable belief that the time-stamp was accurate, although they later discovered it was not);

The Court will dismiss the state law claims asserted against the officers in their official capacities because such claims are duplicative of the claims asserted against the District of Columbia. *See Atchinson v. District of Columbia*, 73 F.3d 418, 424, 315 U.S. App. D.C. 318 (D.C. Cir. 1996).

see also Weishapl v. Sowers, 771 A.2d 1014, 1020-21 (D.C. 2001); *Minch v. District of Columbia*, 952 A.2d 929, 937-38 (D.C. 2008). In deciding whether the officer acted in good faith, the evidence must be viewed from the perspective of the officer, not from the plaintiff's perspective. Civil Jury Instructions § 18.03.

A. Unlawful Entry

Defendants argue that they are entitled to summary judgment on the state law unlawful entry claim because a reasonable officer could have believed, in good-faith, that the arrests were appropriate given the statements by the purported owner that he had not given the Plaintiffs or Peaches permission to occupy the premises. (Doc. 31, Defs.' Summ. J. Brief 29.) If the unlawful entry statute justified arrest solely based upon evidence that Plaintiffs were discovered on the property without permission from the owner, then all of Defendants could rely upon the good-faith defense. However, as set forth above, the statute requires more.

It is well settled that where a police officer acts on the basis of an erroneous understanding of the statute, the officers' subjective beliefs are not reasonable. *See Dellums v. Powell*, 566 F.2d 167, 176-77, 184 U.S. App. D.C. 275 (D.C. Cir. 1977) (stating, while applying the subjective, good-faith belief test, that "an arrest may not be 'justified by ignorance or disregard of settled, indisputable law.'") [20] Accordingly, Plaintiffs are

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[20] Although the Court in *Dellums v. Powell*, 566 F.2d 167, 176-77, 184 U.S. App. D.C. 275 (D.C. Cir. 1977), reached this holding in a Section 1983 false arrest case, the analysis is still applicable to a common law false arrest claim. *Dellums* was handed down under prior Section 1983 law which provided that officers were entitled to qualified immunity where their conduct was objectively reasonable or where they had a subjective good faith belief that their conduct was lawful. *See Harlow v. Fitzgerald*,

entitled to summary judgment on the common law false arrest claim based upon unlawful entry as to the Defendant District of Columbia and as to those individual Defendant officers, Parker and Campanale, who knew or should have known prior to the arrest that the Plaintiffs had been invited to enter the property, but failed to recognize the relevance of that information. Where the officers knew of the invitation to the Plaintiffs, the Court finds that their belief that the unlawful entry arrests were proper was neither bona fide nor reasonable. *Compare*, *District of Columbia v. Tulin*, 994 A.2d 788, 800 (D.C. 2010) (court found that where the defendant police officer had a bona fide, but mistaken, belief that the arrest was proper, she was the lowest ranking person on the scene, and she was directly advised to arrest the plaintiff by a higher ranking officer, she had a reasonable, subjective good-faith belief that entitled her to the defense).

As with the § 1983 unlawful entry claim, the jury must decide the extent to which Officers Newman, Khan and Espinosa knew Plaintiffs had been invited to the house.

B. Disorderly Conduct

With respect to the disorderly conduct charge, as discussed above, the Court finds that the Plaintiffs were arrested without probable cause. Because there is a factual dispute regarding whether the defendant officers were involved in the arrests for that charge, both motions for summary judgment as to the claims against the individual Defendants must be denied. It

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457 U.S. 800, 815-20, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In 1982, five years after *Dellums*, the United States Supreme Court rejected the subjective portion of the qualified immunity test for federal claims. *Harlow*, 457 U.S. at 820.

will be up to the jury to determine which individual police officer Defendants participated in the disorderly conduct arrests.

The District of Columbia was named as a Defendant to this claim, and the city is potentially liable under *respondeat superior* even if none of the named Defendant police officers are held liable because a city employee, Lt. Netter, ordered the arrest of the Plaintiffs. Thus, the District is liable for false arrest unless it can show that Netter had a subjective belief that the arrest was justified and that such a belief was reasonable. However, the District failed in its pleadings supporting its summary judgment motion or in opposition to Plaintiffs's motion to submit a declaration, deposition testimony, or any other direct evidence about the state of mind of Netter or those with whom he consulted. Thus, the District has failed to create a disputed issue of fact as to whether Netter's order to arrest the Plaintiffs was subjectively reasonable and in good faith, as the undisputed evidence in the record indicates instead that it was "the product of the government's willful ignorance, investigative negligence, or [was] otherwise unreasonable." *Liser v. Smith*, 254 F. Supp.2d 89, 97 (D.D.C. 2003). Therefore, the Court grants the Plaintiffs' motion for summary judgment on the disorderly conduct false arrest claim as asserted against the District of Columbia.

VI. NEGLIGENT SUPERVISION CLAIM

The negligent supervision claim has been brought solely against Defendant District of Columbia. (Doc. 33, Pls.' Summ. J. Response 4.) The District of Columbia courts have adopted the following Restatement of Agency provision with respect to employer liability for negligent supervision:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders o[r] in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others;
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213 (1958), cited *in District of Columbia v. Tulin*, 994 A.2d 788, 795 (D.C. 2010) (false arrest case involving liability of the City for conduct of supervisory police officer).

Applying the Restatement to the facts in the instant case and viewing those facts in the light most favorable to the District, the Court finds that the Plaintiffs have proven their claim for negligent supervision. For the reasons outlined above, the Court finds that the undisputed evidence shows that both Netter and Suber gave "improper or ambiguous orders," and each supervisor "permitt[ed] or faile[ed] to prevent" negligent conduct by their subordinate officers. *See Restatement (Second) of Agency* § 213(a), (d).

The District proffers two arguments in support of its defense, neither of which is persuasive. First, the District argues it cannot be held liable for negligent supervision in the absence of some antecedent act that

put the District on notice that its employees had previously committed torts or acted in an incompetent manner. *See DaKa v. McCrae*, 839 A.2d 682, 693 (D.C. 2003) (liability for negligent supervision requires antecedent proof of a tort committed by the supervised employee); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 760 (D.C. 2001). ("To invoke this theory of liability it is incumbent upon a party to show that an employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee.") (citation omitted). This antecedent act requirement is not absolute, however.

In *District of Columbia v. Tulin*, 994 A.2d 788, 793-97 (D.C. 2010), plaintiff obtained a negligent supervision jury verdict based on the conduct of two supervisory police officers, not based upon evidence of an antecedent act by the subordinate officer. The two supervisors in *Tulin* authorized an arrest without obtaining "critical" information needed to establish whether the arrest was lawful. *Id.* at 797. Relying on the Restatement, the Court upheld the jury verdict for the plaintiff and explained that "supervisors can surely be negligent by not informing themselves properly and by thus authorizing or failing to prevent an unlawful arrest." *Tulin*, 994 A.2d at 793-97.

Tulin clearly allows for a negligent supervision claim without an antecedent act. This approach makes perfect sense in cases such as this one, where a supervisory official directs a subordinate employee to act in the supervisor's presence. For this tort, the focus is on the supervisor's ability and responsibility to manage or control the subordinate employee. *Compare Brown*, 782 A.2d at 759-60 (upholding summary

judgment for defendant supermarket on a claim of negligent supervision, in part, because no person with supervisory authority saw the incident at issue or had an opportunity to stop it). Indeed in *Tulin*, the Court explained that a

> jury could reasonably find that the District, through [the two Sergeants], was negligent in its duty to supervise [the arresting officer] and to protect Mr. Tulin from a wrongful arrest. . . . [T]he jury could [have] conclude[d] that . . . the sergeants at the scene should have recognized that the investigation was inadequate and that the arrest was unlawful, but that they nevertheless failed to prevent Officer McKoy from making it.

994 A.2d at 800. Applying the Restatement provision and the reasoning from *Tulin* to the facts of the case at bar, the Court finds that the District is not entitled to summary judgment for negligent supervision because the unlawful arrests were ordered by high level officials who knew or should have known that probable cause was lacking for these arrests.

The District next argues Plaintiffs' negligent supervision claim fails because Plaintiffs do not have expert testimony to establish the requisite standard of care. Defendant cites three cases for the proposition that expert testimony is essential where negligent operations, supervision, and training of police officers are at issue. *See Linares v. Jones*, 551 F. Supp.2d 12, 20 (D.D.C. 2008); *Cotton v. District of Columbia*, 541 F. Supp.2d 195, 207 (D.D.C. 2008); *Parker v. Grand Hyatt Hotel*, 124 F. Supp.2d 79, 90 (D.D.C. 2000). These cases do not, however, hold that expert testimony is required in all police negligent supervision cases.

District of Columbia law provides that "[e]xpert testimony is required . . . where the subject presented is 'so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.'" *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 200 (D.C. 1991) (citation omitted). On the other hand, "[w]here negligent conduct is alleged in a context which is within the realm of common knowledge and everyday experience, the plaintiff is not required to adduce expert testimony . . . ." *Id.* (citations omitted). As this Circuit has recognized, "the factual context matter[s]," when determining the need for expert testimony under District of Columbia law. *Godfrey*, 559 F.3d at 573.

The decision in *Tulin* supports a finding that expert testimony is not required in this case. 994 A.2d at 794-97. As noted above, *Tulin* involved supervising officers whose failure to obtain "critical" information at an accident scene led to an unlawful arrest. *Id.* at 796-97. For example, they failed to obtain information regarding the speed of two vehicles and the distance between the vehicles prior to a rear end collision. *Id.* at 795-96. Citing the simple road safety laws relevant to the accident, the Court held that the case was not one where "lay jurors would be unable to grasp the issues without expert assistance." *Tulin*, 994 A.2d at 795.

Similarly, the instant Court finds that an impartial trier of fact can determine, without the aid of an expert, whether Suber, Netter and the OAG breached the standard of care by directing the defendant officers to arrest Plaintiffs. *See Godfrey*, 559 F.3d at 573 (upholding finding that expert testimony was not required where the supervisor was present when the act was committed and the supervisor had both the

authority and ability to "supervise or control [the subordinate's] behavior"). As in *Tulin*, the statutes here are not complicated and the duty to conduct a proper investigation, as well as the duty to uphold that law, are not "distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *See Beard*, 587 A.2d at 200.

Accordingly, Plaintiffs' failure to proffer expert testimony is not fatal to their negligent supervision claim. Indeed, Plaintiffs' motion for summary judgment will be granted on said claim and Defendants' motion for summary judgment must be denied.

VII. CONCLUSION

For the reasons set forth above, the Court finds that:

Count I: Section 1983 False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment will be granted as it relates to Plaintiffs' Section 1983 claims asserted against the officers in their official capacities. Said claims against defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities will be dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment will be granted with respect to Plaintiffs' Section 1983 *unlawful entry* false arrest claims asserted against Defendants Anthony Campanale and Andre Parker in their individual capacities.

c) In all other respects, the parties' Motions for Summary Judgment with respect to Count I will be denied.

Count II: State Law False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment will be granted as it relates to the state law false arrest claims asserted against the individual officers in their official capacities. Said claims against Defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities will be dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment will be granted with respect to the state law *unlawful entry* false arrest claims asserted against the Defendants District of Columbia, Campanale and Parker.

c) Plaintiffs' Motion for Summary Judgment will be granted with respect to the state law disorderly conduct false arrest claim asserted against the Defendant District of Columbia.

d) In all other respects, the parties' Motions for Summary Judgment with respect to Count II will be denied.

Count III: State Law Negligent Supervision Claim

Plaintiffs' Motion for Summary Judgment will be granted with respect to the state law negligent supervision claim against Defendant District of Columbia The District of Columbia's Motion for Summary Judgment on Count III will be denied.

SO ORDERED.

January 18, 2012

Robert L. Wilkins, United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 9-cv-501 (RLW)

THEODORE WESBY, ET AL.,

Plaintiffs,

vs.

DISTRICT OF COLUMBIA, ET AL.,

Defendants.

ORDER ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

For the reasons set forth in the accompanying Memorandum Opinion, the Court finds that Defendants' Motion for Summary Judgment, (Doc. 31), and Plaintiffs' Motion for Summary Judgment, (Doc. 25), are hereby granted in part and denied in part:

Count I: Section 1983 False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment is hereby granted as it relates to Plaintiffs' Section 1983 claims asserted against the officers in their official capacities. Said claims against defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities are hereby dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment is hereby granted with respect to Plaintiffs' Section 1983 *unlawful entry* false arrest claims asserted against Defendants Anthony Campanale and Andre Parker in their individual capacities.

c) In all other respects, the parties' Motions for Summary Judgment with respect to Count I are hereby denied.

Count II: State Law False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment is hereby granted as it relates to the state law false arrest claims asserted against the individual officers in their official capacities. Said claims against Defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities are hereby dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment is hereby granted with respect to the state law *unlawful entry* false arrest claims asserted against the Defendants District of Columbia, Campanale and Parker.

c) Plaintiffs' Motion for Summary Judgment is hereby granted with respect to the state law disorderly conduct false arrest claim asserted against the Defendant District of Columbia.

d) In all other respects, the parties' Motions for Summary Judgment with respect to Count II are hereby denied.

Count III: State Law Negligent Supervision Claim

Plaintiffs' Motion for Summary Judgment is hereby granted with respect to the state law negligent supervision claim against Defendant District of Columbia. The District of Columbia's Motion for Summary Judgment on Count III is hereby denied.

SO ORDERED.

January 18, 2012
Robert L. Wilkins, United States District Judge

APPENDIX C

816 F.3d 96;
2016 U.S. App. LEXIS 2140

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7127

THEODORE WESBY, ET AL.,

Appellees,

v.

DISTRICT OF COLUMBIA, ET AL.,

Appellants.

EDWIN ESPINOSA, OFFICER—METROPOLITAN POLICE DEPARTMENT, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ET AL.,

Appellees.

February 8, 2016, Filed

COUNSEL: For Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Antoinette Colbert, Gary Gordon, James Davis, Joseph Mayfield, Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Stanley Richardson, Plaintiffs - Appellees: Gregory L. Lattimer, Esquire, Law Offices of Gregory L. Lattimer, PLLC, Washington, DC.

For District of Columbia, Anthony Campanale, Officer – Metropolitan Police Department, in both his official and individual capacities, Andre Parker, Officer - Metropolitan Police Department, in both his official and individual capacities, Defendants - Appellants: Loren L. AliKhan, Deputy Solicitor General, Todd Sunhwae Kim, Solicitor General, Irvin B. Nathan, Carl James Schifferle, Assistant Attorney General, Office of the Attorney General, District of Columbia, Office of the Solicitor General, Washington, DC.

For Edwin Espinosa, Officer - Metropolitan Police Department, in both his official and individual capacities, J. Newman, Officer - Metropolitan Police Department, in both his official and individual capacities, Faraz Khan, Officer - Metropolitan Police Department, in both his official and individual capacities, Defendants - Appellees: Loren L. AliKhan, Deputy Solicitor General, Office of the Attorney General, District of Columbia, Office of the Solicitor General, Washington, DC.

JUDGES: Before: GARLAND, Chief Judge; HENDERSON,** ROGERS, TATEL, BROWN,** GRIFFITH,** KAVANAUGH,** SRINIVASAN, MILLETT, PILLARD,** AND WILKINS,* Circuit Judges. PILLARD, Circuit Judge, and EDWARDS, Senior Circuit Judge, concurring in the denial of rehearing en banc. KAVANAUGH, Circuit Judge, with whom Circuit Judges HENDERSON, BROWN, and GRIFFITH join, dissenting from the denial of rehearing en banc.

** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

** A statement by Circuit Judge Kavanaugh, with whom Circuit Judges Henderson, Brown, and Griffith join, dissenting from the denial of rehearing en banc, is attached.

** A statement by Circuit Judge Pillard and Senior Circuit Judge Edwards, concurring in the denial of rehearing en banc, is attached. Pursuant to Fed. R. App. P. 35(a), Senior Judge Edwards, a member of the merits panel, did not participate in the vote whether to grant rehearing en banc.

* Circuit Judge Wilkins did not participate in this matter.

OPINION

On Petition for Rehearing En Banc

ORDER

Appellants' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

CONCUR BY: PILLARD

CONCUR

PILLARD, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*, concurring in the denial of rehearing *en banc*: The panel opinion has none of the ambition that Judge Kavanaugh, dissenting from denial of rehearing *en banc*, attributes to it. It does not alter the law of probable cause or the law of qualified immunity. The panel agrees with virtually everything the dissent says about the law. Our disagreement is about the facts.

I.

The dissent accuses us of establishing new rules of law. We have done no such thing. In fact, we view the law the same way the dissent does.

1. The dissent asserts that we created a new rule "that officers are required to believe the statements of suspected trespassers who claim that they have permission to be on the property." Dissent 18. It contends that our opinion obliges officers to accept suspects' implausible protestations of innocence and ignore other, circumstantial evidence of culpability. *Id.* at 9-10. That is not the law, nor did we so hold.

Rather, we agree with the dissent that, if the facts of which officers are aware and the reasonable inferences that arise from those facts cast doubt on a suspect's story, officers need not credit the suspect. *See id.* at 12, 18. Indeed, our opinion specifically acknowledges that officers are "entitled to discredit" a suspect's claims of an "innocent explanation for entry into a house in the face of conflicting evidence," *Wesby v. District of Columbia*, 765 F.3d 13, 21 n.4, 412 U.S. App. D.C. 246 (D.C. Cir. 2014) (citing *Wright v. City of*

Philadelphia, 409 F.3d 595, 603 (3d Cir. 2005)); if other facts give rise to probable cause, the officer may arrest, "notwithstanding exculpatory statements from the suspect," *id.* (quoting *Dahl v. Holley*, 312 F.3d 1228, 1234 (11th Cir. 2002)).

We also acknowledged that circumstantial evidence may "make it reasonable to infer" that a suspect has a culpable state of mind. *Id.* at 22. To reach that conclusion, officers do not need trial-worthy evidence. We expressly noted that "[p]robable cause 'does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.'" *See id.* at 20 (quoting *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). The dissent agrees. *See* Dissent 7 ("To have probable cause to arrest, a police officer does not need proof beyond a reasonable doubt, or even by a preponderance of the evidence, that an individual committed a crime.").

Taking these points together, so long as there is evidence giving rise to probable cause—even if that evidence is only circumstantial and short of preponderant—officers may lawfully arrest, no matter what a suspect claims in his or her own defense. There is nothing novel about our view. The dissent's sampling of cases from across the circuits confirms that it is widely held. *See id.* at 11-14.

2. The dissent worries that our opinion erodes the protection qualified immunity provides officers who must make "on-the-spot credibility judgments" and quickly "resolve difficult mens rea questions." *Id.* at 2, 11. Our first point of agreement should put the dissent at ease—officers are not required to take suspects at their word when they deny their guilt. A second point

also ought to assuage the dissent: If officers mistakenly conclude that there is probable cause, they are nonetheless entitled qualified immunity if their mistake was reasonable. *See Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam). Our opinion does not ignore or weaken that important protection, which gives officers the necessary "breathing room" to perform their difficult, dangerous jobs and safeguard the public. *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011). It simply finds that a reasonable officer could not conclude, based on the information before *these particular officers*, that there was probable cause.

It is also worth noting that this case is quite unusual, in that the officers did not make any heat-of-the-moment judgment calls about the partygoers' mens rea or whether they were telling the truth about having been invited. First, nothing about the investigation was rushed and nothing about the situation posed any imminent risk. The officers spent two hours on the scene calmly assessing the situation, J.A. 381, and more time back at the station deliberating over which charge to bring. (The officers originally processed the partygoers for unlawful entry, then dropped that charge and, after discussing the case with representatives of the Attorney General's office, processed them for disorderly conduct, then dropped that charge as well. J.A. 45-50.) Second, these defendants did not in fact make any determinations about the partygoers' mindset, because they did not think either one mattered. *See infra* 9 & n.1.

II.

We and the dissent agree on two other clearly established points of law.

1. The dissent does not dispute our rather unexceptional statement that arresting officers need "at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest." *Wesby*, 765 F.3d at 26. When officers lack probable cause to believe that a necessary element of an offense is present, they lack probable cause to arrest. *See id.*; *United States v. Christian*, 187 F.3d 663, 667, 337 U.S. App. D.C. 402 (D.C. Cir. 1999); *accord Wright*, 409 F.3d at 602 ("Whether any particular set of facts suggest that an arrest is justified by probable cause requires an examination of the elements of the crime at issue."). The same is true when the only circumstances officers observe amount to conduct that is privileged by a defense.

Setting aside for the moment its particular application here, the dissent seems to agree with that proposition as a legal matter. *See* Dissent 10-11, 15. The dissent quotes with approval a recent Second Circuit statement of the law that officers must accept a suspect's defense if "'the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs.'" *Id.* at 15 (quoting *Garcia v. Doe*, 779 F.3d 84, 93 (2nd Cir. 2015) (amended opinion)). Our decision fully comports with Garcia. Our own prior decisions and those of other courts are in accord. *See Hutchins v. District of Columbia*, 188 F.3d 531, 535, 338 U.S. App. D.C. 11 (D.C. Cir. 1999) (en banc) (noting that a police officer may detain a minor for violating a curfew law if the "police officer reasonably believes that an offense has occurred under the curfew law and that no defense exists"); *Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C.

1997) (acknowledging the "unusual" possibility of circumstances that, "while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that the police would not even have probable cause for an arrest"); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999) (observing that the "law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States*, [267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925)], that probable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of an arrest," which includes an arrestee's "uncontroverted" defense).

2. In addition to agreeing that officers need "some showing" of each element, *Wesby*, 765 F.3d at 22, we and the dissent agree that the key element in this case was whether the partygoers entered a place they *knew or should have known* was off limits. The dissent does not dispute, nor could it, that it is no crime for a person to enter premises without authorization if that person has a bona fide belief that she is permitted to enter. It frames the issue well:

> It is undisputed that the partiers were on private property without permission from an owner or renter, and without other lawful authority. Therefore, this is a case where the actus reus of the crime was complete. The sole issue from the perspective of a reasonable police officer was whether the partiers had the necessary mens rea to commit the crime of trespassing. If the partiers believed that they had permission from a lawful owner or renter to use the house, then the partiers did

not commit the offense of trespassing under D.C. law.

Dissent 9.

At the time of the challenged arrests, the law in the District of Columbia had, indeed, long been clear that in unlawful entry cases the suspect's state of mind matters. *See, e.g., Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989) (affirming because the evidence showed "appellant's intention to be on the premises contrary to [the owner's] will"); *Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985) (affirming because "officers could reasonably conclude that appellant knowingly entered 'against the will of . . . the person lawfully in charge'"). By the same token, it had long been clear that if a person has "a bona fide belief" that he is permitted to enter, "he lacks the element of criminal intent required by" the law "and is not guilty of unlawful entry." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971); *see McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). Although the *Ortberg* case, which came down after these arrests, stated more precisely the culpable state of mind required to prove unlawful entry, *Ortberg* simply articulated what "decades of case law" had already made "clear"—that the government must "establish that the defendant knew or should have known that his entry was unwanted." *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013). Indeed, the model jury instruction for unlawful entry going back to at least 1993 describes the required state of mind in those terms. *See* Criminal Jury Instructions for the District of Columbia, No. 4.36 (4th ed. 1993) ("The government must prove beyond a reasonable doubt not only that the defendant entered against the will of the lawful occupant of the premises, but also that s/he knew, or

should have known, that s/he was entering against the will of the occupant.").

III.

The only criticism we have of the dissent's view of the law is that it would relieve the officers of their burden to justify an arrest by effectively presuming probable cause if nothing in the record forecloses it. The dissent commits that error in sketching three scenarios, two that it describes as supported by probable cause, and one that it acknowledges is not. Dissent 14-15. The first possibility the dissent identifies is that, although Peaches invited them, the partygoers knew or might have known that she was not renting the house and so could not lawfully invite them there. A second possibility is that the partygoers might have lied to the police when they said that Peaches invited them, and that Peaches then made up a corresponding lie to give her friends cover. In the third scenario, the partygoers told the truth that Peaches invited them, and they had no reason to suspect that she was not authorized to do so. The dissent contends that each scenario is possible, and that "the officers did not have a way to rule out either of the first two scenarios." *Id.* at 15.

We have two responses. First, there is no evidence in the record that suggests that the partygoers and Peaches cooked up a plot to mislead the police, and the dissent points to none. Instead, the dissent simply speculates, "[w]ho knows" whether or how they might have coordinated? *Id.* at 14. Certainly not the officers. They never—neither at the time of the arrest nor during the subsequent litigation—pointed to a circumstance tending to show that the partygoers and Peaches were colluding.

Second, and more fundamentally, in suggesting that a lack of information—a "who knows?" gap—could suffice to support probable cause, the dissent advocates a position that would impermissibly shift the burden of discerning probable cause. Officers may not do what the dissent does—posit that a person is up to no good and then ask whether there is clear reason to rule out any theoretical wrongdoing. *See Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."); *Adams*, 407 U.S. at 148 ("Probable cause to arrest depends 'upon whether, at the moment the arrest was made . . . the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)). The probable cause requirement, even as flexible and contextual as it appropriately is, authorizes arrest only when the facts and circumstances give officers reason to believe that someone is violating or has violated the law.

The bare, unsupported possibility that an officer *might have* disbelieved the partygoers when they said they had been invited is not ground for arrest--nor for qualified immunity. Contra Dissent 19. The dissent contends that an officer's doubts about a suspect's credibility count as "information" that can controvert evidence dissipating probable cause. *Id.* at 10, 20. We do not disagree with that proposition as a legal matter. When officers actually doubt a suspect's credibility, and when those doubts fairly arise from their observations and the information available to them,

officers may take their doubts into account when assessing whether the totality circumstances support probable case. *See, e.g.*, *McComas v. Brickley*, 673 F.3d 722, 726-27 (7th Cir. 2012); *Wright*, 409 F.3d at 603. The officers in this case, however, did not actually doubt that the partygoers were telling the truth when they said Peaches invited them. In fact, the officers did not think the partygoers' credibility mattered at all. They did not think it mattered because they believed—incorrectly and unreasonably—that the partygoers' state of mind was legally irrelevant.

IV.

Our disagreement with the dissent comes down to our case-specific assessment of the circumstantial evidence in the record.

We found that an officer could not conclude—not even reasonably, though mistakenly—that the partygoers had a culpable state of mind. It is not surprising that the record, consisting of what the officers took note of at the time, lacks evidence of what the partygoers knew, or even what they ought to have known, about whether they had been legitimately invited into the house. At the time of the arrest, and even in this litigation, the defendants misunderstood the clearly established elements of unlawful entry. They believed (erroneously) that it did not matter what the partygoers knew or did not know about their permission to be at the premises. Once the owner told the officers he had not yet rented the house to Peaches and he had not allowed the guests to attend a party there, the officers believed they had all they needed.[1]

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[1] When opposing counsel asked Sergeant Suber at his deposition if it mattered "whether or not [the partygoers] believed, based upon what Peaches told them, that they had the

Of course, even though the defendant officers in this case did not seek to determine whether the partygoers themselves knew or should have known that they were not authorized to be present at the house, if the information known to the officers when they made the arrests nonetheless fairly suggested that the partygoers were or should have been aware that they were unwelcome, the arrests would have been lawful. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *United States v.*

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right to be there," he answered, "Peaches nor the other individuals occupying that location did not have the right to be there." J.A. 48; *see id.* at 129 ("Q: And so what I'm trying to understand is why did you reach that conclusion [that it was a lawful arrest] when you knew that Peaches had given them permission to be there? [Suber]: Because Peaches didn't have permission to be there."); *see also id.* at 99 (deposition testimony of Defendant Officer Parker explaining that Sergeant Suber decided to arrest everyone because the owner had said that nobody had his permission to be in the house).

Even in their summary judgment papers, the defendants continued to assert the irrelevance of the partygoers' mindset. The defendants acknowledged that "each of [the partygoers] admitted that they were social guests," but stressed that "this statement is not material" because none of the plaintiffs owned the property and liability turns on "whether MPD Officers reasonably believed that the plaintiffs were not the owners and did not have a possessory interest in the property." J.A. 59 (Defs.' Resp. to Pls.' Statement of Facts, ECF No. 30, Ex. 1 at 2). In their rehearing petition before this court as well, the defendants suggest that it somehow was not clearly established that the offense of unlawful entry includes a state of mind requirement. *See* Pet. Reh'g En Banc 12 (contending that the panel erred because it "found the law clearly established 'that probable cause required some evidence that the Plaintiffs knew or should have known that they were entering against the will of the lawful owner'" (quoting *Wesby*, 765 F.3d at 27)). As discussed in the court's opinion and in the text, *supra* 5-6, that is a misstatement of clearly established law.

Bookhardt, 277 F.3d 558, 565, 349 U.S. App. D.C. 317 (D.C. Cir. 2002); *United States v. Joyner*, 492 F.2d 655, 656, 160 U.S. App. D.C. 389 (D.C. Cir. 1974) (per curiam) ("[A]n arrest will be upheld if probable cause exists to support arrest for an offense that is not denominated as the reason for the arrest by the arresting officer."). And if the facts in the record could at least arguably give rise to probable cause, the defendants would be entitled to qualified immunity. *See Hunter*, 502 U.S. at 227; *Wardlaw v. Pickett*, 1 F.3d 1297, 1304, 303 U.S. App. D.C. 130 (D.C. Cir. 1993).

The dissent thinks an officer in the defendants' position could reasonably believe there was probable cause. Dissent 14-15. For the reasons explained in our opinion, we disagree that the record here supports probable cause, either actually or arguably. That is the extent of our disagreement, no more, no less. Our dispute—whether these particular defendants are entitled to qualified immunity on the plaintiff's Fourth Amendment claim—is entirely "fact-bound," *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779, 191 L. Ed. 2d 856 (2015) (Scalia, J., concurring in part and dissenting in part), and therefore hardly deserves the dissent's doomsaying. As our nearly complete agreement with the dissent on the governing principles underscores, we did not invent or invert any law to reach the result in this case. And the thinness of the record is quite anomalous, as it stems from the officers' legal error at the scene. We accordingly concur in the denial of rehearing *en banc*.

DISSENT BY: KAVANAUGH

DISSENT

KAVANAUGH, *Circuit Judge*, with whom *Circuit Judges* HENDERSON, BROWN, and GRIFFITH join, dissenting from the denial of rehearing en banc: In a series of recent qualified immunity cases, the Supreme Court has repeatedly told the courts of appeals that police officers may not be held liable for damages unless the officers were "plainly incompetent" or "knowingly violate[d]" clearly established law. *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (internal quotation marks omitted). The Supreme Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3, 191 L. Ed. 2d 856, 866 n.3 (2015). Indeed, in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals. *See Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (summary reversal); *Taylor v. Barkes*, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (summary reversal); *Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856; *Carroll*, 135 S. Ct. 348, 190 L. Ed. 2d 311 (summary reversal); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Wood v. Moss*, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

In my view, the panel opinion in this case contravenes those emphatic Supreme Court directives. Two D.C. police officers have been held liable for a total of almost $1 million. That equates to about 20 years of after-tax income for the officers, not to mention the harm to their careers.[1] For what? For arresting for trespassing a group of people who were partying late at night with drugs and strippers *in a vacant house that the partiers did not own or rent*. To be sure, the partiers claimed that they had permission from a woman named Peaches to use the vacant house. But the officers soon learned that Peaches herself did not have permission to use the house. And the officers reasonably could have thought that the partiers probably knew as much. Therefore, the officers reasonably could have concluded that there was probable cause to arrest the partiers for trespassing. The officers were not "plainly incompetent" and did not "knowingly violate" clearly established law when they made these arrests. The officers are entitled to qualified immunity.

The Supreme Court has reminded us that qualified immunity is important "to society as a whole." *Sheehan*, 135 S. Ct. at 1774 n.3, slip op. at 10 n.3 (internal quotation marks omitted). That holds true in this case. The Attorney General for the District of Columbia has filed a vigorous petition for rehearing en banc. The Attorney General's petition convincingly

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[1] As the Supreme Court has said: "Whatever contractual obligations" the District of Columbia "may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution." *Sheehan*, 135 S. Ct. at 1774 n.3, slip op. at 10 n.3.

explains how the panel opinion will negatively affect the ability of D.C. police officers to make the on-the-spot credibility judgments that are essential for officers to perform their dangerous jobs and protect the public. I would grant the Attorney General's petition.

Responding to this dissent, the panel majority says that it agrees with this dissent about the law and that our disagreement with one another is simply about how the law applies to the facts. But that is true in most qualified immunity cases. At a high enough level of generality, the law of qualified immunity is settled, as are the relevant Fourth Amendment principles. But what has concerned the Supreme Court in numerous cases is how lower courts apply the general qualified immunity and Fourth Amendment principles to the facts of particular cases.[2] That is my concern here as well.

I

At about 1:00 a.m. on March 16, 2008, the District of Columbia's Metropolitan Police Department received a complaint about loud music and possible illegal activity at a house east of the Anacostia River

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[2] In similar en banc circumstances, another court of appeals recently reconsidered a panel opinion about qualified immunity in a false arrest case. In *Garcia v. Jane & John Does* 1-40, 779 F.3d 84 (2d Cir. 2015), Judge Calabresi and Judge Lynch, over the dissent of Judge Livingston, originally denied the officers' qualified immunity motion. After the officers filed a strongly worded petition for rehearing en banc, the three-judge panel unanimously issued an amended opinion holding that the police officers were entitled to qualified immunity. *See id.* at 87. Many of the issues in that Second Circuit case resemble the issues in this case. I respectfully suggest that similar re-examination of the original panel opinion would have been warranted here.

between Benning Road and East Capitol Street, a short distance northeast of RFK Stadium. According to the caller, the house where the party was taking place had been "vacant for several months." Metropolitan Police Department Arrest/Prosecution Report, reprinted in Joint Appendix ("J.A.") 73.

Police officers quickly responded to the scene. The officers heard music coming from inside the house. After knocking on the door and entering, the officers observed that the house was sparsely furnished and "in disarray," consistent "with it being a vacant property." *Id.* In the living room, they saw a large group of people engaged in behavior consistent "with activity being conducted in strip clubs for profit." *Id.* Several women were "dressed only in their bra and thong with money hanging out" of "their garter belts." Officer Khan Interrogatory, J.A. 163. The officers smelled marijuana. When the officers entered, the partiers initially scattered into other rooms.

The officers talked to everyone present in the house. The 21 people who were there told the officers conflicting stories about what they were doing on the property. Some said they were celebrating a birthday party. Most said it was a bachelor party. But the guest of honor was not identified to the officers.

The people in the house also gave conflicting stories about who had supposedly given them permission to use the house. No one could identify the owner of the house. Several people said that they had been invited by other people. Some said that a woman known as "Peaches" or "Tasty" had given the partiers permission to use the house. But Peaches was not present at the house.

Notwithstanding the conflicting stories and suspicious circumstances, the officers did not immediately arrest the partiers for trespassing. Rather, the officers took time to further investigate the situation. The officers contacted both Peaches and the owner of the house. They reached Peaches by phone. The officers thought that Peaches was evasive. Peaches said that she had given the partiers permission to use the house. But when the officers asked who in turn had given Peaches authority to use the house, Peaches responded that she was "possibly renting the house from the owner," who was "fixing the house up for her." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 25-26 (D.D.C. 2012) (Deposition of Sergeant Suber). When pressed by the officers, Peaches finally admitted that she did not have authority to use the house. She refused to come to the house because she said that she would be arrested. She hung up the phone on the officers.

The officers then called the owner of the house, Mr. Hughes. Mr. Hughes told the police officers that no one—including Peaches—had authority to use the house.

After they had assessed the scene, talked to the partiers, and gathered information from Peaches and Mr. Hughes, the police officers arrested the people in the house for trespassing, an offense known as "unlawful entry" under D.C. law. Trespassing is a minor offense under D.C. law.[3] Prosecutors later decided not to pursue charges against the partiers.

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[3] Under D.C. law, trespassing is punishable by a maximum jail sentence of 180 days and a maximum fine of $1,000. D.C. Code § 22-3302.

After all of the charges arising out of the incident had been dropped, many of the 21 people who had been arrested turned around and sued the police officers and the District of Columbia under Section 1983 and D.C. law. The plaintiffs claimed that the officers had made the arrests without probable cause. The officers countered that they had probable cause to arrest the plaintiffs for trespassing. The officers also asserted that, in any event, they were entitled to qualified immunity for two distinct reasons. First, it was at least reasonable for the officers to believe that they had probable cause to arrest under these factual circumstances. And second, the officers did not contravene any clearly established law by making these arrests for trespassing.

On cross motions for summary judgment, the District Court concluded that the officers did not have probable cause to arrest and, moreover, were not entitled to qualified immunity. The District Court granted summary judgment to the plaintiffs. After a trial on damages, a jury awarded the plaintiffs $680,000. Attorney's fees brought the total award to almost $1 million. The police officers and the District of Columbia are jointly and severally liable for that total.[4]

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[4] For purposes of Section 1983 liability, the District of Columbia is considered a municipality. *See People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 425, 364 U.S. App. D.C. 386 (D.C. Cir. 2005). As a municipality, the District of Columbia "cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior theory*." *Singletary v. District of Columbia*, 766 F.3d 66, 72, 412 U.S. App. D.C. 351 (D.C. Cir. 2014) (quoting *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)) (internal quotation marks omitted). The

The District of Columbia and the police officers appealed to this Court. A panel of this Court affirmed the judgment of the District Court. The panel opinion concluded that the police officers did not have probable cause to arrest the plaintiffs and were not entitled to qualified immunity. Judge Brown dissented. The District of Columbia and the police officers sought rehearing en banc. I would grant en banc review.

II

The police officers persuasively argue that they had probable cause to arrest the partiers for trespassing. But regardless of whether the officers had probable cause, they are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause. Could the officers have walked away from the vacant house filled with partiers? Sure. Could they have broken up the party and then left? No doubt. Indeed, in retrospect, that might well have been a better decision. But did the officers act in a "plainly incompetent" manner or "knowingly violate" clearly

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District of Columbia may be held liable under Section 1983 only when the execution of a government "policy or custom" inflicts an injury for which the District of Columbia "as an entity is responsible under § 1983." *Id.* (quoting *Monell*, 436 U.S. at 694) (internal quotation marks omitted).

In this case, the plaintiffs did not allege that a government policy or custom led to the arrests. Because respondeat superior is not a theory of liability in Section 1983 cases against municipalities, the District of Columbia was therefore not liable for the Section 1983 claims. The District of Columbia instead was liable for the D.C. law claims. The damages award was not apportioned between the Section 1983 and D.C. law claims. The District of Columbia and the two officers are jointly and severally liable for the full amount.

established law by making these arrests for trespassing? No.

To begin with, the probable cause standard itself gives police officers substantial leeway when determining whether to make an arrest. As the Supreme Court has explained, probable cause is a "fluid concept" that turns on "factual and practical considerations of everyday life on which reasonable and prudent" persons, "not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231-32, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (internal quotation marks omitted). Probable cause is "not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. To have probable cause to arrest, a police officer does not need proof beyond a reasonable doubt, or even by a preponderance of the evidence, that an individual committed a crime. As the Supreme Court has emphasized: "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence" have "no place in the [probable-cause] decision." *Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61, 67 (2013) (alteration in original) (internal quotation marks omitted).

In damages suits against officers, the doctrine of qualified immunity adds an extra dose of judicial deference to our review of the officer's probable cause determination. As a general matter, qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (internal quotation marks omitted). The "crucial question" is "whether the

official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056, 1069 (2014).

In applying the qualified immunity doctrine to the issue of probable cause to make arrests, the Supreme Court has said that officers "who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (internal quotation marks omitted); *see also Wardlaw v. Pickett*, 1 F.3d 1297, 1304, 303 U.S. App. D.C. 130 (D.C. Cir. 1993). In accord with that Supreme Court precedent, most courts of appeals—including our Court—have ruled that officers may not be held liable for damages for allegedly wrongful arrests so long as they had "arguable probable cause" to make the arrest. *See, e.g.*, *Moore v. Hartman*, 644 F.3d 415, 422, 396 U.S. App. D.C. 28 (D.C. Cir. 2011), *vacated on other grounds*, 132 S. Ct. 2740, 183 L. Ed. 2d 612 (2012); *Cox v. Hainey*, 391 F.3d 25, 33 (1st Cir. 2004); *Garcia v. Jane & John Does* 1-40, 779 F.3d 84, 92 (2d Cir. 2015); *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 207 (5th Cir. 2009); *Greene v. Barber*, 310 F.3d 889, 898 n.2 (6th Cir. 2002); *McComas v. Brickley*, 673 F. 3d 722, 725 (7th Cir. 2012); *Ulrich v. Pope County*, 715 F.3d 1054, 1059 (8th Cir. 2013); *Blankenhorn v. City of Orange*, 485 F.3d 463, 475 (9th Cir. 2007); *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014); *Morris v. Town of Lexington Alabama*, 748 F.3d 1316, 1324 (11th Cir. 2014).

Therefore, in suits alleging a lack of probable cause to arrest, officers are not liable if they arguably had probable cause—that is, if the officer *reasonably could have believed* that there was probable cause to arrest.

As a result, the qualified immunity question in this case is not whether the officers had probable cause to arrest the partiers at the house. Rather, the question is whether the officers *reasonably could have believed* that they had probable cause to arrest for trespassing a group of people who were having a party late at night with strippers and drugs in a vacant house that none of the partiers owned or rented, notwithstanding the partiers' claims that they had permission from a woman named Peaches to use the house.

The qualified immunity question in this case is readily answered by a few basic principles of criminal law and procedure. Under D.C. law, it is unlawful to enter private property without permission from the owner or renter, or without other lawful authority. *See Ortberg v. United States*, 81 A.3d 303, 306-07 (D.C. 2013). It is undisputed that the partiers were on private property without permission from an owner or renter, and without other lawful authority. Therefore, this is a case where the actus reus of the crime was complete. The sole issue from the perspective of a reasonable police officer was whether the partiers had the necessary mens rea to commit the crime of trespassing. If the partiers believed that they had permission from a lawful owner or renter to use the house, then the partiers did not commit the offense of trespassing under D.C. law. *See id.* at 308-09.

The only question in this case, then, is whether the officers could reasonably disbelieve the partiers when the partiers said that they thought they had permission to use the house.

In a case like this where the actus reas is complete and the sole issue is the defendant's mens rea, police officers often must make credibility assessments on the spot, sometimes in difficult circumstances. In

those situations, are police officers always required to believe the statements of the suspects—in this case, the partiers in the house? Of course not. Yet the panel opinion seems to say yes, at least for this kind of case. According to the panel opinion, "in the absence of any conflicting information," a police officer does not have probable cause to arrest people for trespassing if those people claim that they were invited by "someone with apparent (if illusory) authority." *Wesby v. District of Columbia*, 765 F.3d 13, 21, 412 U.S. App. D.C. 246 (D.C. Cir. 2014). And under the panel's approach, even if a reasonable police officer could have doubted the credibility of the people claiming to have been invited to the house, those credibility doubts do not count as "conflicting information." See id.

The panel opinion's approach is not and has never been the law. When police officers confront a situation in which people appear to be engaged in unlawful activity, the officers often hear a variety of mens rea-related excuses. "The drugs in my locker aren't mine." "I don't know how the loaded gun got under my seat." "I didn't realize the under-aged high school kids in my basement had a keg." "I wasn't looking at child pornography on my computer, I was hacked." "I don't know how the stolen money got in my trunk." "I didn't see the red light." "I punched my girlfriend in self-defense."

But in the heat of the moment, police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present. As Judge Brown said, the law does not require officers "to credit the

statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." *Wesby*, 765 F.3d at 36 (Brown, J., dissenting). And as the Second Circuit recently stated: A police officer is required to accept a suspect's *mens rea*-related defense only if, among other things, "the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs." *Garcia*, 779 F.3d at 93.

Almost every court of appeals has recognized that officers cannot be expected to *definitively* resolve difficult mens rea questions in the few moments in which officers have to decide whether to make an arrest. Consider the following sample:

- "Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Amobi v. D.C. Department of Corrections*, 755 F.3d 980, 990, 410 U.S. App. D.C. 338 (D.C. Cir. 2014) (internal quotation marks omitted).
- The "practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great." *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004).
- "It is up to the factfinder to determine whether a defendant's story holds water, not

the arresting officer. . . . Once officers possess facts sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury. Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989).

- "Absent a confession, the officer considering the probable cause issue in the context of crime requiring a mens rea on the part of the suspect will always be required to rely on circumstantial evidence regarding the state of his or her mind." *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000).

- "The probable cause inquiry looks to the totality of the circumstances; the standard does not require that officers correctly resolve conflicting evidence or that their determinations of credibility, were, in retrospect, accurate." *Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005).

- In "considering the totality of the circumstances," a defendant's "innocent explanations for his odd behavior cannot eliminate the suspicious facts from the probable cause calculus." *Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (internal quotation marks omitted).

- An investigator's "failure to make a further investigation into the suspect's state of mind does not constitute lack of probable cause if

all objective elements of a crime reasonably appear to have been completed." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (internal quotation marks omitted).

- Police are "under no obligation to give any credence to a suspect's story . . . if the facts as initially discovered provide probable cause." *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) (internal quotation marks omitted).

- "Many putative defendants protest their innocence, and it is not the responsibility of law enforcement officials to test such claims once probable cause has been established." *Spiegel v. Cortese*, 196 F.3d 717, 724 (7th Cir. 1999).

- "When an officer is faced with conflicting information that cannot be immediately resolved," the officer "need not rely on an explanation given by the suspect" and "may have arguable probable cause to arrest a suspect." *Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012) (internal quotation marks omitted).

- "Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior. The test is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) (internal quotation marks omitted).

- The police officers "were not required" to forgo arresting the defendant "based on initially discovered facts showing probable cause simply because" the defendant "offered a different explanation." *Marx v. Gumbinner*, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990).

Here, in the brief time in which the officers had to decide whether to make arrests, they could not definitively resolve the difficult question of the partiers' mens rea. Mr. Hughes, the owner of the house, told the police officers that no one had authority to use the house. At the same time, Peaches told the officers that she had given the partiers permission to use the house. But there were holes in Peaches's story.

Under these circumstances, a reasonable officer could interpret the situation in at least three different ways. *First*, even if Peaches "invited" the partiers to use the house, maybe the partiers still knew that Peaches did not really have lawful authority to use the vacant house. In other words, maybe the partiers were not unwittingly duped by Peaches but instead knew or suspected that Peaches was not renting the house and did not have authority to invite the partiers there. *Second*, maybe the partiers were lying when they said that Peaches had given them permission to use the house, and maybe Peaches then played along and supplied cover for her friends when the officers reached her on the phone. (Did someone from the party text Peaches first to give her a heads-up? Who knows.) *Third*, maybe the partiers were telling the whole truth and were unwittingly misled by Peaches into thinking that she had authority over the house.

In the first two scenarios, a reasonable officer would have probable cause to arrest the partiers for trespassing. In the third scenario, a reasonable officer would not have probable cause to arrest.

But at the time of the arrests, the officers did not have a way to rule out either of the first two scenarios. After all, a police officer is required to accept a suspect's mens rea-related defense only if, among other things, "the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs." *Garcia*, 779 F.3d at 93. In this case, the officers had several reasons to doubt that the partiers were telling the truth when they claimed that Peaches had given them permission to use the house. The partiers were in a vacant house late at night without the owner or renter present. The partiers gave conflicting explanations for what they were doing at the house, and about who had supposedly given them permission to be there. The police officers also had several reasons to doubt that Peaches was telling the truth. When the officers contacted Peaches, she refused to come to the house because she said she would be arrested, and she gave conflicting accounts of her authority over the house.

Of course, maybe further investigation would ultimately establish that the third scenario was in fact what had happened. Maybe the partiers had been unwittingly misled by Peaches into thinking that she had authority over the house. But that was not the only reasonable interpretation of the situation at the time of the arrests. And once "a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every

theoretically plausible claim of innocence before making an arrest." *Amobi*, 755 F.3d at 990 (internal quotation marks omitted).

In short, the officers were required to make an on-the-spot credibility determination in a situation far removed from the serenity and unhurried decision-making of an appellate judge's chambers. Under the circumstances, it was entirely reasonable for the officers to have doubts about the partiers' story and to conclude that there was probable cause to arrest the partiers for trespassing. The police officers are entitled to qualified immunity.[5]

III

The police officers are also entitled to qualified immunity for a second, independent reason. At the time the officers made the arrests here, the arrests violated no clearly established statutory or constitutional right. Any such right was created by the panel opinion in this case—years after the officers made the arrests.

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[5] Qualified immunity examines whether police officers' actions are "*objectively* reasonable," not whether police officers *subjectively* believe that their actions are reasonable. *Moore*, 644 F.3d at 423 n.7 (emphasis added) (quoting *Wardlaw*, 1 F.3d at 1305) (internal quotation marks omitted). The District Court's opinion noted that a few of the police officers at the scene "erroneously believed that the question of whether Plaintiffs had been invited onto the property was irrelevant." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 38 n.15 (D.D.C. 2012). The panel majority's concurrence in the denial of rehearing en banc similarly highlights the officers' subjective beliefs. Concurrence 3, 8-9 & n.1. But because qualified immunity is an objective inquiry, an officer's subjective belief about the law is not relevant to the qualified immunity issue.

The Supreme Court has stated many times that officers are entitled to qualified immunity unless a plaintiff can show that "the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 (2014) (internal quotation marks omitted); *see also Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78, 81 (2015) (summary reversal); *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856, 866 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (summary reversal); *Wood v. Moss*, 134 S. Ct. 2056, 2061, 188 L. Ed. 2d 1039, 1044 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 4, 187 L. Ed. 2d 341, 343 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985, 992 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149, 1155 (2011).

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Taylor*, 135 S. Ct. at 2044, slip op. at 4 (internal quotation marks omitted). The Supreme Court has emphasized that courts must "define the clearly established right at issue on the basis of the specific context of the case." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895, 901 (2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)) (internal quotation marks omitted). The Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 131 S. Ct. at 2084, slip op. at 10. "Qualified immunity is no immunity at all if clearly established law can simply be defined" at a high level of generality. Sheehan, 135 S. Ct. at 1776, slip op. at 13 (internal quotation marks omitted).

That longstanding rule is one manifestation of the law's general concern about retroactive punishment or liability. *See generally Landgraf v. USI Film Products*, 511 U.S. 244, 265-67, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). It would be unfair for a court to impose monetary liability on a police officer by creating a new legal rule and then applying that new rule retroactively to punish the officer's conduct. Without "fair notice, an officer is entitled to qualified immunity." *Sheehan*, 135 S. Ct. at 1777, slip op. at 15 (internal quotation marks omitted). Because "the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004); *see also Taylor*, 135 S. Ct. at 2045, slip op. at 5 (clearly established precedent must put officials "on notice of any possible constitutional violation"); *Plumhoff*, 134 S. Ct. at 2023, slip op. at 13 ("We did not consider later decided cases" when determining whether an officer violated clearly established law because those cases "'could not have given fair notice'" to the officer.).

At the time of the arrests here, no case had said that officers are required to believe the statements of suspected trespassers who claim that they have permission to be on the property. On the contrary, as explained above, it was and is settled law that officers do not automatically have to believe a suspect's excuses when the officers catch the suspect in the midst of an activity that otherwise appears to be illegal. And in the trespassing context in particular, the most relevant D.C. trespassing cases *supported*

arrest in this kind of case. *See Artisst v. United States*, 554 A.2d 327, 330 n.1 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967).

In *Artisst v. United States*, for example, the defendant argued that the evidence was not sufficient for a jury to convict him for trespassing in a Georgetown University dorm. 554 A.2d at 329. Artisst claimed that he had entered the building to buy soccer equipment from a dorm resident and that he therefore lacked the necessary intent to commit unlawful entry. *Id.* The D.C. Court of Appeals upheld the conviction, finding that a jury could disbelieve Artisst's explanation. *See id.* at 330 n.1. But under the panel opinion here, the police presumably could not even have arrested *Artisst*, much less a jury have convicted him.

Similarly, in *McGloin v. United States*, the defendant challenged his conviction for trespassing in an apartment building. 232 A.2d at 90. *McGloin* told the arresting officer that he had entered the building to look for his cat. *Id.* *McGloin* later told the same officer that he had entered the building to look for a friend. *Id.* The D.C. Court of Appeals upheld McGloin's conviction, noting that although "one who enters for a good purpose and with a bona fide belief of his right to enter is not guilty" of trespassing, this "is not such a case." *Id.* at 91. But again, under the panel opinion here, the police presumably could not even have arrested McGloin, much less a jury have convicted him.

The panel opinion sweeps that D.C. Court of Appeals case law under the rug. The panel opinion does not analyze *Artisst*, and it distinguishes *McGloin* as "merely" recognizing that under certain circumstances, it is "reasonable to infer an interloper's intent to enter against the will of the owner." *Wesby v.*

District of Columbia, 765 F.3d 13, 22, 412 U.S. App. D.C. 246 (D.C. Cir. 2014).

But the D.C. Court of Appeals case law is on point. In my opinion, that case law clearly *permits* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser. If juries in trespassing cases can refuse to credit defendants' explanations for their unlawful presence in buildings, police officers surely can do the same. After all, the standard of proof for convictions is beyond a reasonable doubt, but the standard for an arrest is the far lesser showing of probable cause. *See Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61, 67 (2013).

But even apart from those D.C. Court of Appeals decisions, one thing is crystal clear: No decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances. This should have been a fairly easy case for qualified immunity. Instead, the panel opinion did what the Supreme Court has repeatedly told us not to do: The panel opinion created a new rule and then applied that new rule retroactively against the police officers. The panel opinion held that "in the absence of any conflicting information," officers do not have probable cause to arrest people for trespassing if those people claim that they were invited by "someone with apparent (if illusory) authority." *Wesby*, 765 F.3d at 21. On top of that, the panel opinion added a dubious gloss to its novel rule: Even if a reasonable police officer could have doubted the credibility of the trespassers who claimed to be invitees, those credibility doubts do not count as "conflicting information." What case had ever articulated such a counterintuitive rule? Crickets.

Whatever the merits of the panel opinion's new rule—and I think it is divorced from the real world that police officers face on a regular basis—it is still a new rule. And as the Supreme Court has shouted from its First Street rooftop for several years now, qualified immunity protects officers from personal liability for violating rules that did not exist at the time of the officers' actions. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1777, slip op. at 15; *Plumhoff*, S. Ct. at 2023, slip op. at 13-14; *Stanton*, 134 S. Ct. at 7, slip op. at 8.[6] The police officers in this case did not violate clearly established law when they arrested the partiers. The officers are entitled to qualified immunity.[7]

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[6] To be sure, "in an obvious case," general constitutional principles "can clearly establish the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199 (internal quotation marks omitted). For example, the Supreme Court concluded that handcuffing a prison inmate to a hitching post for seven hours in the sun and without water was an "obvious" violation of the *Eighth Amendment's* prohibition on cruel and unusual punishment. *Hope v. Pelzer*, 536 U.S. 730, 738, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). But the case before us now is hardly an "obvious" case of unconstitutionality. Arresting partiers late at night in a vacant house for trespassing when police officers could reasonably doubt that the partiers had authority to use the house is far from an "obvious" violation of constitutional rights by police officers.

[7] The plaintiffs brought suit against the police officers not only under Section 1983 but also under D.C. law. Under D.C. law, a police officer is not liable for the tort of false arrest if the police officer had probable cause to make the arrest, or "if the officer can demonstrate that (1) he or she believed, in good faith, that his [or her] conduct was lawful, and (2) this belief was reasonable." *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012) (alteration in original) (internal quotation marks omitted). Under D.C. law, then, a police officer is entitled to immunity from a false arrest suit if the officer both (i) *reasonably could have believed* that there was probable cause to arrest and (ii) *subjectively*

* * *

The qualified immunity doctrine affords police officers room to make reasonable judgments about whether they have probable cause to make arrests. The Supreme Court has emphasized that the doctrine protects all but the plainly incompetent or those who knowingly violate clearly established law. The officers in this case were not plainly incompetent, nor did they knowingly violate clearly established law. Anything but. Even if the officers ultimately were wrong in concluding that they had probable cause (and I do not think they were wrong), it was at least reasonable for the officers to believe that they had probable cause under the circumstances and applicable law. They should not be subject to $1 million in damages and fees for their on-the-spot decision to make these

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believed in good faith that there was probable cause to arrest. As the D.C. Court of Appeals has held, that "standard resembles the section 1983 probable cause and qualified immunity standards," with "the added clear articulation of the requirement of good faith." *District of Columbia v. Minor*, 740 A.2d 523, 531 (D.C. 1999).

This opinion has analyzed the objective aspect of the standard. As to the subjective aspect, the two defendant police officers in this case, Officers Parker and Campanale, believed in good faith that they had probable cause to make the arrests because the officers were unable to definitively determine if the partiers were telling the truth when they claimed to have permission to use the house. Officer Parker indicated that the officers made the arrests because "one person said" that the partiers "didn't have the right" to use the house, and "one person said" that the partiers "did have the right" to use the house. Deposition of Officer Parker, J.A. 99. Officer Campanale similarly stated that the officers arrested the partiers because "[n]obody could determine who was supposed to be inside the residence," and because the partiers were "present inside of a location that" the partiers did "not have permission to be in." Deposition of Officer Campanale, J.A. 124.

trespassing arrests. To be sure, I do not dismiss the irritation and anguish, as well as the reputational and economic harm, that can come from being arrested. Police officers should never lightly take that step, and the courts should not hesitate to impose liability when officers act unreasonably in light of clearly established law. But that is not what happened here, not by a long shot. I respectfully dissent from this Court's decision not to rehear this case en banc.